Docket for 05-128

(9)

No. 05-128

Title: Howard Delivery Service, Inc., et al., Petitioners
v.
Zurich American Insurance Co.

Docketed: July 26, 2005
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (04-1136)
Decision Date: March 24, 2005
Questions Presented

Date	Proceedings and Orders
Jun 10 2005	Application (04A1048) to extend the time to file a petition for a writ of certiorari from June 22, 2005 to July 22, 2005, submitted to The Chief Justice.
Jun 15 2005	Application (04A1048) granted by The Chief Justice extending the time to file until July 22, 2005.
Jul 22 2005	Petition for a writ of certiorari filed. (Response due August 25, 2005)
Aug 22 2005	Waiver of right of respondent Zurich American Insurance Co. to respond filed.
Aug 31 2005	DISTRIBUTED for Conference of September 26, 2005.
Sep 7 2005	Response Requested . (Due October 7, 2005)
Oct 6 2005	Brief of respondent Zurich American Insurance Co. filed.
Oct 19 2005	DISTRIBUTED for Conference of November 4, 2005.
Nov 7 2005	Petition GRANTED.
Dec 22 2005	Joint appendix filed.
Dec 22 2005	Brief of petitioner Howard Delivery Service, Inc., et al filed.
Dec 22 2005	Brief amicus curiae of National Coordinating Committee for Multiemployer Plans filed.
Jan 23 2006	SET FOR ARGUMENT on Tuesday, March 21, 2006.
Jan 26 2006	Brief of respondent Zurich American Insurance Co. filed.
Jan 26 2006	Brief amici curiae of American Home Assurance Company, et al. filed.
Feb 7 2006	CIRCULATED.
Feb 9 2006	Record received from U.S.C.A. 4th Circuit. (1 envelope)
Feb 21 2006	Record received from U.S.D.C. - Western District of West Virginia. (1 envelope)
Feb 23 2006	Record received from U.S. Bankruptcy Court for Northern District of West Virginia. (1 envelope)
Mar 2 2006	Reply of petitioners Howard Delivery Service, Inc., et al filed. (Distributed)
Mar 21 2006	Argued. For petitioners: Paul F. Strain, Baltimore, Md. For respondent: Donald B. Verilli, Jr., Washington, D.C.
Mar 21 2006	Letter fom counsel for the respondent received. (Distributed).
Mar 23 2006	Letter from counsel for the petitioners received. (Distributed).

FILED
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No. 05-128

IN THE

Supreme Court of the United States

HOWARD DELIVERY SERVICE, INC., Debtor, and the OFFICIAL COMMITTEE of UNSECURED CREDITORS of HOWARD DELIVERY SERVICE, INC.,

Petitioners,

v.

ZURICH AMERICAN INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a bankruptcy case, is an unsecured claim for unpaid premiums owing for a debtor's statutory workers' compensation liability insurance policy entitled to priority under Section 507(a)(4) of the Bankruptcy Code as a "contribution to an employee benefit plan arising from services rendered", as held by the Fourth and Ninth Circuits, or is such a claim not entitled to Section 507(a)(4) priority, as held by the Sixth, Eighth and Tenth Circuits?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

All of the stock of Petitioner Howard Delivery Service, Inc. ("HDS"), is owned by an individual. HDS is the debtor in a chapter 11 bankruptcy case styled *In re Howard Delivery Service, Inc.*, Case No. 02-30289, pending in the United States Bankruptcy Court for the Northern District of West Virginia (the "Bankruptcy Proceedings").

Petitioner, the Official Committee of Unsecured Creditors of Howard Delivery Service, Inc. (the "Committee"), was duly appointed and serves as the official representative of unsecured creditors in the Bankruptcy Proceedings.

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CITATIONS OF OPINIONS AND ORDERS

The judgment of the United States Court of Appeals for the Fourth Circuit in *Howard Delivery Service, Inc. v. Zurich American Insurance Company (In re Howard Delivery Service, Inc.)*, C.A. No. 04-1136, decided March 24, 2005, reversing and remanding the memorandum opinion and order of the United States District Court for the Northern District of West Virginia, is set forth in the Appendix hereto and is published at 403 F.3d 228 (4th Cir. 2005) (App. 1a-38a).

The unpublished Memorandum Opinion and Order Affirming Order of the Bankruptcy Court, entered by the United States District Court for the Northern District of West Virginia in *Howard Delivery Service, Inc. v. Zurich American Insurance Company (In re Howard Delivery Service, Inc.)*, No. 3:03CV61, 2003 U.S. Dist. LEXIS 26464 (N.D.W.Va. December 22, 2003, as corrected December 23, 2003), is set forth in the Appendix hereto. (App. 39a-50a).

The unpublished Memorandum Opinion of the United States Bankruptcy Court for the Northern District of West Virginia, entered in *Howard Delivery Service, Inc. v. Zurich American Insurance Company (In re Howard Delivery Service, Inc.)*, BK No. 02-30289, 2003 Bankr. LEXIS 2142 (Bankr. N.D.W. Va. July 15, 2003), is set forth in the Appendix hereto (App. 51a-57a).

BASIS FOR JURISDICTION IN THIS COURT

The judgment of the United States Court of Appeals for the Fourth Circuit in *Howard Delivery Service, Inc. v. Zurich American Insurance Company (In re Howard Delivery Service, Inc.)*, No. 04-1136, was entered on March 24, 2005 (App. A).

On June 10, 2005, within ninety days of the entry of judgment by the United States Court of Appeals for the Fourth Circuit, Petitioners filed their Application for an Extension of Time to File a Petition for a Writ of Certiorari in this Court. On June 15, 2005, The Chief Justice extended the time for filing a petition to and including July 22, 2005.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED IN THE CASE

11 U.S.C. § 507(a)(4):

§ 507. Priorities

(a) The following expenses and claims have priority in the following order:

* * *

(4) Fourth, allowed unsecured claims for contributions to an employee benefit plan –

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plar , to the extent of –

(i) the number of employees covered by each such plan multiplied by $4,650, less

(ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

29 U.S.C. § 1002

§ 1002. Definitions

For purposes of this title:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical,

surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186 of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2) (A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provided retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this Act providing one or more exempt categories under which—

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement, shall, for purposes of this title, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this Act applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * * *

29 U.S.C. § 1003

§ 1003. Coverage

* * *

(b) The provisions of this title shall not apply to any employee benefit plan if—

* * *

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

* * * *

STATEMENT OF THE CASE

Petitioners HDS and the Committee seek review of the judgment of the United States Court of Appeals for the Fourth Circuit, expressed in the Court's *per curiam* opinion, two separate concurring opinions (Judges King and Shedd), and a dissenting opinion (Judge Niemeyer). The Fourth Circuit reversed the United States District Court for the Northern District of West Virginia (Judge Stamp), which had affirmed the United States Bankruptcy Court for the Northern District of West Virginia.

Both the District Court and the Bankruptcy Court held that a claim for unpaid premiums for workers' compensation insurance is not entitled to priority under Section 507(a)(4) of the Bankruptcy Code, in accord with the Sixth, Eighth

and Tenth Circuits. However, the Fourth Circuit, agreeing with the Ninth Circuit, reversed, and held that such a claim is entitled to priority under Section 507(a)(4) of the Bankruptcy Code.

HDS and the Committee respectfully submit that the Fourth Circuit erred in failing to follow the majority of the Circuit Courts that have considered this issue, and contend that Section 507(a)(4) of the Bankruptcy Code does not afford priority to claims for unpaid premiums for workers' compensation insurance because such premiums are not "contributions to an employee benefit plan, arising from services rendered".

For many years, HDS operated as an over-the-road freight carrier throughout the Midwest and Mid-Atlantic areas of the United States. It employed hundreds of truck drivers, mechanics, freight handlers, management and general administrative personnel. Due to the demise of a profitable business relationship with General Motors Corporation, HDS's business began to deteriorate in 2001. HDS wound down its operations, and eventually terminated its freight hauling operations entirely in the second half of 2001.

Prior to the Bankruptcy Proceedings, Zurich American provided insurance to HDS covering workers' compensation liability, general liability, cargo and automobile liability, effective from July 1, 1997 through January 22, 2002. The claim that is the subject of this petition, and that was addressed by the courts below, arises from unpaid premiums for workers' compensation insurance.

On January 30, 2002, HDS filed its voluntary petition for relief under chapter 11 of the Bankruptcy Code. By order

entered March 7, 2003, the Bankruptcy Court confirmed the Second Amended Plan of Reorganization filed by the Committee. HDS no longer operates any business, and its assets consist of a few items of personal property yet to be liquidated, together with significant cash proceeds of its liquidation to be distributed to creditors. The proceeds held by HDS are not sufficient to pay all creditors in full.

On March 28, 2003, Zurich American filed Amended Proof of Claim No. 306 in the Bankruptcy Proceedings. Claim No. 306 was for unpaid premiums for workers' compensation insurance in the amount of $410,215.00. Zurich American alleged that this claim was entitled to priority pursuant to Section 507(a)(4) of the Bankruptcy Code.

The question presented in this petition, whether claims for unpaid workers' compensation insurance premiums are entitled to priority under Section 507(a)(4) of the Bankruptcy Code, came before the Bankruptcy Court upon HDS's Objection to Claim No. 306, wherein HDS contended, *inter alia*, that Claim No. 306 was not entitled to priority.

The Bankruptcy Court agreed with HDS, as did the District Court. The Fourth Circuit, however, reversed, and held that such insurance premiums constitute "contributions to an employee benefit plan, arising from services rendered", and that claims for unpaid workers' compensation insurance premiums are thus entitled to priority under Section 507(a)(4).

Jurisdiction in the court of first instance, the United States Bankruptcy Court for the Northern District of West Virginia, is founded upon 28 U.S.C. § 1334(a), and the Order of Reference of all cases filed under Title 11, United States Code, to that court, entered by the United States District Court for the Northern District of West Virginia.

REASONS FOR GRANTING THE PETITION

A. The Decision Entered by a Sharply Divided Fourth Circuit Court of Appeals is in Direct Conflict with the Decisions of Three Other Circuit Courts of Appeals on the Same Question Presented.

Under Section 507(a)(4) of the Bankruptcy Code ("Section 507(a)(4)"), Congress grants priority to contributions payable by an employer to an employee benefit plan. Section 507(a)(4) provides, in pertinent part, that:

> (a) The following expenses and claims have priority in the following order . . .
>
> (4) Fourth, allowed unsecured claims for **contributions** to an **employee benefit plan** –
>
> (A) arising from **services rendered** within 180 days before the date of the filing of the petition . . . ; but only
>
> (B) for each such plan, to the extent of –
>
> (i) the number of employees covered by each plan multiplied by $4,650; less
>
> (ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate

> on behalf of such employees to any other employee benefit plan.

11 U.S.C. § 507(a)(4) (emphasis added).

The Sixth, Eighth and Tenth Circuits all hold that claims for unpaid workers' compensation insurance premiums are not entitled to priority under Section 507(a)(4). On the other hand, the Ninth Circuit, and now the Fourth Circuit, construe Section 507(a)(4) so as to afford priority to a claim for these unpaid insurance premiums. *Compare Travelers Prop. Cas. Corp. v. Birmingham-Nashville Express, Inc., (In re Birmingham-Nashville Express, Inc.)* 224 F.3d 511 (6th Cir. 2000); *State Ins. Fund v. Southern Star Foods, Inc., (In re Southern Star Foods)*, 144 F.3d 712 (10th Cir. 1998), *cert. denied*, 525 U.S. 978 (1998), and *Employers Ins. v. Ramette, (In re HLM Corp.)*, 62 F.3d 224 (8th Cir. 1995) (all denying priority treatment), with *Employers Ins. v. Plaid Pantries*, 10 F.3d 605 (9th Cir. 1993) (affording priority treatment); and *Howard Delivery Serv., Inc. v. Zurich Am. Ins.*, 403 F.3d 228 (4th Cir. 2005) (*per curiam*).

Not only are the Circuit Courts split three to two on the application of Section 507(a)(4), but the Fourth Circuit panel itself was split two to one, and was unable to achieve a majority opinion. Ultimately, the Fourth Circuit issued a *per curiam* opinion, accompanied by two separate opinions concurring in the judgment, and one opinion dissenting from the judgment. Both the District Court and the Bankruptcy Court denied the priority claimed by Zurich American under Section 507(a)(4). The Fourth Circuit reversed these lower tribunals.

B. The Question Presented in this Case Regarding Priority of Claims is Important to Nearly Every Bankruptcy Case in which the Debtor Has Employees, and Should be Resolved by the Court.

One of the principal purposes of the Bankruptcy Code is to provide a means for the equitable distribution of the bankruptcy estate's limited resources. Section 507 of the Bankruptcy Code codifies a priority scheme for the various claims typically asserted by creditors in a bankruptcy case. Where a particular claim falls within the priority hierarchy established by Section 507 determines whether the claim will be paid in full, in part or perhaps not at all. In chapter 11 cases, claim priority also determines claim classification which affects plan voting and confirmation and thus potentially the success or failure of a debtor's reorganization efforts. The priority assigned to a particular claim is of critical importance, not only to the claimholder, but also to all parties in interest in a bankruptcy proceeding.

As all three judges on the Fourth Circuit panel observed, Section 507(a)(4) was enacted by Congress in 1978 specifically to expand priority status to include employee benefits in addition to "wages . . . due to workmen," which were already given priority under Section 104(a) (2) of the Bankruptcy Act, the predecessor to Section 507(a). Claims for unpaid employee benefits are often held on account of hundreds, sometimes thousands, of employees. The interpretation of Section 507(a)(4) will impact distribution in virtually all bankruptcy cases in which the debtor is an employer.[1]

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1. Under current law, Section 507(a)(4) provides that claims for contributions to an "employee benefit plan" are provided priority (Cont'd)

Most states require employers to carry workers' compensation insurance. As those employers slide into insolvency and eventually into bankruptcy, at least a portion of employee benefit plan obligations and workers' compensation insurance premiums will likely be unpaid, leaving the payment of those claims, and their priority, to be determined by the Bankruptcy Code. How Section 507(a)(4) is applied to workers' compensation insurance premiums will have a profound effect on how the priority claims of employee benefit plans are treated in pending and future bankruptcy cases.

C. The Decision of the Fourth Circuit Panel Majority is Fundamentally Flawed.

The holding of the Fourth Circuit is fundamentally flawed. In concluding that unpaid workers' compensation insurance premiums are entitled to priority status under Section 507(a)(4), Judge King, concurring in the judgment of the Fourth Circuit, first concludes that the relevant statutory terms "contributions," "employee benefits plan," and "services rendered," are plain and unambiguous. *Howard Delivery*, 403 F.3d at 232 (King, J., concurring); *Robinson v. Shell Oil Co*, 519 U.S. 337, 340 (1997) ("Our inquiry must

---

(Cont'd)

if those contributions arise from services rendered within the 180 days before the earlier of the filing of bankruptcy or cessation of the debtor's operations, but only to the extent of $4,925 per employee (less the amount paid to such employees as priority wage claims under Section 507(a) (3) of the Bankruptcy Code. The current cap went into effect on April 1, 2004, subsequent to the filing of Claim No. 306. Under the newly-enacted Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the cap for employee benefit plan claims increases to $10,000 per employee.

cease if the statutory language is unambiguous . . .). To reach this conclusion, Judge King engages in a piecemeal inquiry as to the "ordinary meaning" of each term, drawing upon Webster's Third New International Dictionary. *See Howard Delivery*, 403 F.3d at 235-237, 244.

Using Webster's Dictionary, Judge King first concludes that HDS's unpaid workers' compensation insurance premiums constitute "contributions" within the meaning of Section 507(a)(4), because they include amounts "paid by an employer to [a] group insurance fund . . . for employees." *Howard Delivery*, 403 F.3d at 235 (quoting *Webster's Third New International Dictionary* 496 (reprint 1993) (1981)).

Judge King next reasons that the insurance coverage provided by HDS's workers' compensation insurance constitutes an "employee benefit plan" because it provides injured workers with cash payments under an insurance "plan". *See id.* at 236 (quoting selected portions from *Webster's Third)*.

Finally, Judge King concludes that the term "services rendered" is not limited to services provided by HDS's employees, but also includes the services rendered by others (*e.g.*, a workers' compensation insurer) that are attributable to the services rendered by HDS's employees. *See id.* at 238.

Even Judge Shedd, in a separate concurring opinion, finds the analysis of Judge King to be in error. First, Judge Shedd questions Judge King's conclusion that the terms contained in Section 507(a)(4) are unambiguous, noting that Judge King merely extracted *one* reasonable interpretation of these terms, not necessarily the *only* reasonable interpretation. Second, Judge Shedd acknowledges that while

specific terms used in Section 507(a)(4) may be unambiguous standing alone, the language of Section 507(a)(4), taken as a whole, nevertheless is ambiguous. *See id.* at 239 (Shedd, J. concurring).

However, in an effort to resolve the ambiguity of Section 507(a)(4), Judge Shedd improperly ascribes to the term "employee benefit plan", as used in Section 507(a)(4), the definition given to that phrase in the Employment Income Retirement Income Security Act of 1974 ("ERISA"). *See id.* at 240-41; 29 U.S.C. § 1002(3). Yet, these two statutes, ERISA and the Bankruptcy Code, cannot reasonably be read *in pari materia* and there is no indication that when Congress used the phrase "employee benefit plan" in Section 507(a)(4), it intended that the definition be fixed by ERISA.

Thus, Judge King failed to look beyond the individual terms used in Section 507(a)(4) in determining whether the statute, as a whole, was unambiguous. *See United States v. Ron Pair Enterprises*, 489 U.S. 235, 247 (1989) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.") Judge Shedd properly determined that Section 507(a)(4) was ambiguous, but improperly confined his analysis of the statute to its ERISA counterpart.

The concurring opinions of Judge King and Judge Shedd both fail to undertake a proper inquiry into Section 507(a)(4)'s legislative history in order to glean Congress' intent in enacting Section 507(a)(4). Moreover, both opinions fail to give proper weight to a fundamental policy of the Bankruptcy Code, namely, that priority treatment of a claim is to be strictly and narrowly construed. *See Howard Delivery*,

403 F.3d at 232 (Niemeyer, J., dissenting). *See also Travelers Prop. Cas. Ins. Corp.*, 224 F.3d 511, 517 (noting that priorities established within the Bankruptcy Code, such as the priority under § 507(a)(4), should be narrowly construed, and that any language purported to create a priority must be "clear and explicit."); *Devan v. Simon Debartolo Group, L.P. (In re Merry-Go-Round Enterprises, Inc.)*, 180 F.3d 149, 157 (4th Cir. 1999) (noting that ". . . there is a general presumption in bankruptcy cases that all of a debtor's limited resources will be equally distributed . . .").

As Judge Niemeyer explained in his dissenting opinion, Section 507(a)(4) was enacted by Congress specifically to overrule two prior decisions of the Supreme Court which held that non-wage employee benefits were not entitled to priority in bankruptcy. *See id.* at 242. (Niemeyer, J., dissenting). The legislative history reveals that:

> Paragraph (4) overrules *United States v. Embassy Restaurant*, which held that fringe benefits were not entitled to wage priority status. The bill recognizes the reality of labor contract negotiations, under which wage demands are often reduced if adequate fringe benefits are substituted. The priority granted is limited to claims for contributions to employee benefit plans such as pension plans, health or life insurance plans, and others, arising from services rendered.

Id. at 243. (Niemeyer, J., dissenting) (quoting H.R. Rep. No. 95-595, at 357 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 (internal citation omitted)).[2] Judge Niemeyer properly

2. Section 507(a)(4) was also intended to overrule *Joint Industry Board v. United States*, 391 U.S. 224 (1968), which followed the reasoning in *United States v. Embassy Restaurant*.

recognizes that payment of an insurance premium for workers' compensation liability is not, and cannot be a "contribution" because it is a liability imposed by statute upon an employer in lieu of tort liability. *See id.* at 244.

Consistent with the Sixth, Eighth and Tenth Circuits, Judge Niemeyer properly recognizes that a workers' compensation insurance policy is not an employee benefit, because the workers' compensation scheme is anything but voluntary. *See id; See also In re HLM*, 62 F.3d 224, 226 (finding that a true benefit exists only in circumstances "where unless an employer offered a life insurance benefit plan, the employee would not necessarily have the coverage."); *In re Southern Star Foods, Inc.*, 144 F.3d 712, 717 (finding that mandatory workers' compensation coverage is more of a right mandated by statute than a bargained-for fringe benefit).

Finally, Judge Niemeyer aptly notes that the workers' compensation insurance "premium is not linked to the 'services rendered' by the employees as is required to qualify for priority status under § 507(a)(4)." *See Howard Delivery*, 403 F.3d at 244 (Niemeyer, J., dissenting).

Because Judge King failed properly to determine that Section 507(a)(4) is ambiguous and the plurality opinion failed to appropriately examine Section 507(a)(4)'s legislative history and give proper weight to the fundamental policy of the Bankruptcy Code that priorities be narrowly construed, the concurring opinions are fundamentally flawed.

CONCLUSION

For all of the reasons set out herein, and for such other reasons as may be apparent to the Court, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED MARCH 24, 2005

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 04-1136

IN RE: HOWARD DELIVERY SERVICE, INCORPORATED,

Debtor.

HOWARD DELIVERY SERVICE, INCORPORATED,

Debtor-Appellee,

v.

ZURICH AMERICAN INSURANCE COMPANY,

Movant-Appellant.

AMERICAN HOME ASSURANCE COMPANY; HARTFORD FIRE INSURANCE COMPANY; THE TRAVELERS INDEMNITY COMPANY,

Amici Supporting Appellant.

Appeal from the United States District Court
for the Northern District of West Virginia, at Martinsburg,
Frederick P. Stamp, Jr., District Judge
(CA-03-61-3; BK-02-30289)

Appendix A

Argued: October 28, 2004.

Decided: March 24, 2005

Before NIEMEYER, KING, and SHEDD, Circuit Judges.

Reversed and remanded by published per curiam opinion. Judge KING wrote an opinion concurring in the judgment, Judge SHEDD wrote an opinion concurring in the judgment, and Judge NIEMEYER wrote an opinion dissenting from the judgment.

OPINION

PER CURIAM:

This appeal presents the question of whether the claim made by Zurich American Insurance Company against the estate of the debtor, Howard Delivery Service, Inc., for unpaid workers' compensation insurance premiums is to be given priority by reason of § 507(a)(4) of the Bankruptcy Code. The court holds that Zurich's claim is entitled to priority under § 507(a)(4) and therefore reverses the decision of the district court and remands the case for such further proceedings as may be appropriate.

REVERSED AND REMANDED

KING, Circuit Judge, concurring in the judgment:

In this appeal by Zurich American Insurance Company ("Zurich"), we are called upon to decide whether a claim by

Appendix A

Zurich for unpaid workers' compensation insurance premiums is entitled to priority status under § 507(a)(4) of the Bankruptcy Code. Zurich maintains that its claim is so entitled, asserting that such premiums constitute, under the applicable statutory provision, "contributions to an employee benefit plan arising from services rendered." 11 U.S.C. § 507(a)(4). Both the bankruptcy court and the district court disagreed with Zurich, relegating its claim to the status of a general unsecured creditor of the bankrupt Howard Delivery Service, Inc. ("Howard"). As explained below, I conclude, on this question of first impression, that Zurich's claim is entitled to § 507(a)(4) priority status.

I.

Under West Virginia law, employers in the state are required to "subscribe to and pay premium taxes into the [state's] workers' compensation fund for the protection of their employees." W. Va.Code § 23-2-1(a). In the alternative, an employer may self-insure by, among other requirements, demonstrating its financial ability to cover any workers' compensation claims that may arise. *Id.* at § 23-2-9. Howard, an over-the-road freight carrier operating in West Virginia, fulfilled its obligations under West Virginia law to become "self-insured" and purchased workers' compensation insurance coverage from Zurich (the "Policy").[1] The Policy became effective on July 1, 1997, and remained in effect until January 22, 2002, when it was cancelled by Howard.

1. Although not relevant to this appeal, Howard also purchased employer's liability and automobile liability policies from Zurich.

Upon cancellation, Howard owed Zurich thousands of dollars in unpaid premiums for coverage afforded by the Policy.[2]

On January 30, 2002, Howard filed a Chapter 11 bankruptcy petition in the bankruptcy court for the Northern District of West Virginia, seeking court protection in the reorganization of its business operations. On May 9, 2002, Zurich filed an unliquidated and unsecured creditor's claim in that proceeding, seeking priority status from the bankruptcy court for its claim for the unpaid premiums owed on the Policy.[3] On March 28, 2003, Zurich filed an amended proof of claim, specifically asserting that its claim was entitled to priority status under § 507(a)(4) of the Bankruptcy Code (the "Statute"), for contributions to an employee benefit plan in the sum of $410,215 (the "Zurich Claim").[4] Pursuant to the Statute, a creditor of a Chapter 11 debtor is authorized to recover on a fourth-level priority basis as follows:

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2. The Policy provided coverage to Howard on a "claims incurred" basis; that is, claims incurred while the Policy was in effect were covered, regardless of when such claims might be made. The Policy was a high-deductible insurance plan, requiring Howard to reimburse Zurich for all losses up to $250,000.

3. Zurich filed another claim in Howard's bankruptcy proceeding on May 9, 2002—an unliquidated, unsecured, and nonpriority claim—which is not relevant to this appeal.

4. The amount of the Zurich Claim is premised on an actuarial analysis of Zurich's exposure to liability for claims incurred while the Policy was in effect. The Zurich Claim was admittedly slightly overstated, because it included a small amount owed under the automobile liability policy and covered a time period slightly in excess of 180 days.

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(a) The following expenses and claims have priority in the following order:

. . . .

(4) Fourth, allowed unsecured claims for contributions to an employee benefit plan—

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first. . . .

11 U.S.C. § 507(a)(4).[5] On June 12, 2003, Howard filed an objection to the amount of the Zurich Claim, and specifically to Zurich's assertion that the Claim was entitled to priority status.

By an opinion filed on July 15, 2003, the bankruptcy court denied the Zurich Claim priority status, concluding that

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5. Creditors holding valid claims of fourth-level priority may recover from the general assets of a bankrupt's estate following, first, secured creditors, and second, unsecured creditors with claims qualifying under the first three levels of priority established by § 507(a). *See In re: Federal's Inc.*, 553 F.2d 509, 518 (6th Cir.1977). The first three levels of priority are: (1) administrative expenses and fees of the estate, (2) claims arising from the ordinary course of business, and (3) wages and salaries up to $4,925. *See* 11 U.S.C. § 507(a)(1)- (9) (creating nine priority levels).

unpaid workers' compensation premiums are not "bargained-for, wage-substitute-type benefits," relying on materials it identified in the legislative history of the Statute. *In re: Howard Delivery Serv., Inc.*, BK No. 02-30289, at *5 (Bankr.N.D.W.Va.) (the "Bankruptcy Opinion") (observing also that three courts of appeals had so ruled while only one had determined otherwise). Zurich appealed the Bankruptcy Opinion to the district court, which affirmed, on December 22, 2003, on similar grounds. *Howard Delivery Serv., Inc. v. Zurich Am. Home Ins. Co. (In re: Howard Delivery Serv., Inc.)*, No. 3:03CV61, at *11 (N.D.W.VA.) (the "District Opinion"). Zurich has now appealed to this Court, contending that the Zurich Claim is entitled to priority status because the unpaid insurance premiums embodied therein constitute "contributions to an employee benefit plan arising from services rendered" under the Statute. We possess jurisdiction to consider Zurich's appeal because, in these circumstances, the District Opinion and the corresponding Judgment in a Civil Case, filed on December 22, 2003, constitute a final decision of the district court under 28 U.S.C. § 158(d).[6]

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6. Subsection (d) of § 158 provides jurisdiction in the courts of appeals "from all final decisions, judgments, orders, and decrees [by a district court] entered under subsection (a)." It is generally acknowledged that the "finality" requirement of § 158(d) is to be interpreted in light of the special circumstances of bankruptcy proceedings. *See Comm. of Dalkon Shield Claimants v. A.H. Robins Co., Inc.*, 828 F.2d 239, 241 (4th Cir.1987). And, as explained by Justice Breyer (then serving on the First Circuit) in a seminal decision on § 158(d) jurisdictional issues, *In re: Saco Local Development Corp.*, a district court's ruling in a priority dispute is typically an appealable ruling. 711 F.2d 441, 445 (1st Cir.1983) ("[A] 'final

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Appendix A

II.

Zurich's appeal concerns the meaning and application of the Statute, which constitutes a question of law that we review de novo. *See Loudoun Leasing Dev. Co. v. Ford Motor Credit Co.*, 128 F.3d 203, 206 (4th Cir.1997). In construing the meaning of a statutory provision, we are obliged to utilize the well-settled two-step process explained in a long series of decisions, including *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 248 (4th Cir.2004). First, we must ascertain whether the language of the statutory provision is plain or ambiguous. If the provision is drawn in plain and unambiguous terms, we simply apply the statute's plain meaning. Alternatively, if the language of the statutory provision is ambiguous, we proceed to the second step in the process and seek to ascertain the meaning intended by Congress when the provision was enacted. In the context of the Bankruptcy Code, it is presumed that a debtor's resources should be equally distributed among the creditors, and

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judgment, order, or decree' . . . includes an order that conclusively determines a separable dispute over a creditor's claim or *priority*.") (emphasis added).

The district court's ruling that the Zurich Claim was not entitled to priority effectively concluded the dispute between Zurich and Howard because the Zurich Claim was then rendered valueless. If the Zurich Claim is not now accorded priority status, Zurich becomes another general unsecured creditor of Howard, and it is agreed that Zurich would then receive nothing from Howard's bankrupt estate. Furthermore, if it loses this appeal, Zurich has agreed to withdraw the Zurich Claim.

statutory priorities are therefore to be narrowly construed. *See In re: Merry-Go-Round Enter., Inc.*, 180 F.3d 149, 157 (4th Cir.1999) (observing general "presumption in bankruptcy cases that all of a debtor's limited resources will be equally distributed among creditors").

III.

In assessing whether the Zurich Claim is entitled to priority status under the Statute, I first briefly review the split of authority in the federal courts as to whether claims for unpaid insurance premiums are so entitled. As explained below, I am of the view that the pertinent statutory terms—"contributions," "employee benefit plan," and "services rendered"—are plain and unambiguous. I am therefore obliged to apply the Statute to the Zurich Claim and, in so doing, conclude that it is entitled to priority status thereunder.

A.

The issue presented by Zurich has been previously considered by several other courts, and they disagree on whether a debtor's unpaid premiums for workers' compensation insurance constitute "contributions to an employee benefit plan arising from services rendered," and on whether a bankruptcy claim for such premiums is thereby entitled to fourth-level priority status under the Statute. *Compare Travelers Prop. Cas. Corp. v. Birmingham-Nashville Express, Inc. (In re: Birmingham-Nashville Express, Inc.)*, 224 F.3d 511 (6th Cir.2000) (denying priority status), *State Ins. Fund v. S. Star Foods, Inc. (In re: S. Star Foods, Inc.)*, 144 F.3d 712 (10th Cir.1998) (same), *and*

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Employers Ins. of Wausau, Inc. v. HLM Corp. (In re: HLM Corp.), 62 F.3d 224 (8th Cir.1995) (same), *with Employers Ins. of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605 (9th Cir.1993) (affording priority status). This disagreement among the courts rests upon opposing constructions of the Statute: the Ninth Circuit (and various district and bankruptcy courts) deeming the Statute to be unambiguous and affording priority to such claims; while the Sixth, Tenth, and Eighth Circuits (as well as several district and bankruptcy courts) have concluded that the Statute's legislative history precludes priority status being accorded to such claims. These divergent views deserve some further examination.

1.

The first line of decisions addressing bankruptcy claims for unpaid insurance premiums, including the Ninth Circuit's decision in *Plaid Pantries*, has found the Statute to be unambiguous, and thus reasoned that legislative history need not be considered. Relying on the Statute's plain meaning, those courts have concluded that the Statute accords priority status to such claims as "contributions to an employee benefit plan arising from services rendered" under the Statute. *See Plaid Pantries*, 10 F.3d at 607 (according priority status to claim for unpaid workers' compensation premiums); *Saco*, 711 F.3d at 449 (according priority status to claim for unpaid employee group life, health, and disability insurance premiums); *Ivey v. Great W. Life & Annuity Ins. Co.*, 308 B.R. 752 (M.D.N.C.2004), *appeal docketed*, No. 04-1576 (4th Cir.2004) (according priority status to claim for unpaid health insurance premiums); *Principal Mut. Life Ins. Co. v. Joint Comm. of Unsecured Creditors (In re: CirrusCorp)*,

196 B.R. 76 (S.D.Tex.1996) (same); *Allegheny Int'l, Inc. v. Metro. Life Ins. Co.*, 145 B.R. 820 (W.D.Pa.1992) (according priority status to claim for unpaid life insurance premiums); *Official Labor Creditors Comm. v. Jet Fla. Sys., Inc. (In re: Jet Fla. Sys., Inc.)*, 80 B.R. 544 (S.D.Fla.1987) (according priority status to claim for unpaid reimbursements for covered medical expenses); *In re: Integrated Health Servs., Inc.*, 291 B.R. 611 (Bankr.D.Del.2003) (according priority status to claim for unpaid workers' compensation insurance premiums); *In re: A.B.C. Fabrics of Tampa, Inc.*, 259 B.R. 759 (Bankr.M.D.Fla.2001) (according priority status to claim for unpaid reimbursements for covered medical expenses); *In re: Braniff, Inc.*, 218 B.R. 628 (Bankr.M.D.Fla.1998) (according priority status to claim for unpaid health and life insurance premiums); *Official Creditors' Comm. of Lummus Indus., Inc. v. Blue Cross & Blue Shield of Ga., Inc. (In re: Lummus Indus., Inc.)*, 193 B.R. 615 (Bankr.M.D.Ga.1996) (according priority status to claim for unpaid health insurance premiums); *see also Perlstein v. Rockwood Ins. Co. (In re: AOV Indus., Inc.)*, 85 B.R. 183 (Bankr.D.D.C.1988) (noting, albeit in dicta, that unpaid workers' compensation premiums are entitled to priority status).

In this series of decisions, the courts that have assessed the priority status of claims premised on unpaid workers' compensation premiums have found such claims to be indistinguishable from claims of priority status involving other types of employer-provided insurance benefits, *e.g.*, health, disability, or life insurance. *See Plaid Pantries*, 10 F.3d at 607; *Integrated Health Servs.*, 291 B.R. at 613. Indeed, the Statute fails to distinguish between an "employee benefit plan" that an employer is statutorily required to

provide to its employees, *i.e.*, workers' compensation, and a benefit plan that an employer voluntarily decides to provide. The courts adopting the plain meaning view of the Statute have thus concluded that bankruptcy claims for unpaid workers' compensation premiums, like those for unpaid health, disability, and life insurance premiums, are entitled to priority status under the Statute.

2.

On the other hand, three of our sister circuits, as well as several of the lower courts, have turned to and relied on aspects of the Statute's legislative history in concluding that claims for unpaid workers' compensation premiums are somehow different from claims for premiums to voluntarily provided benefit plans, and that claims for unpaid workers' compensation premiums are not entitled to priority status as "contributions to an employee benefit plan" under the Statute. *See Birmingham-Nashville,* 224 F.3d at 517 (holding unpaid workers' compensation premiums are not entitled to priority status); *S. Star Foods,* 144 F.3d at 715-17 (same); *HLM Corp.*, 62 F.3d at 225 (same); *In re: Allentown Moving & Storage,* 214 B.R. 761 (E.D.Pa.1997) (same); *Edward W. Minte Co. v. Franey & Parr (In re: Edward W. Minte Co.)*, 286 B.R. 1, 8-13 (Bankr.D.D.C.2002) (same); *In re: Perk Dev. Corp. Brambury Assocs.*, 246 B.R. 753 (Bankr.W.D.N.Y.2000) (same); *In re: Arrow Carrier Corp.*, 154 B.R. 642 (Bankr.D.N.J.1993) (same); *see also In re: AER-Aerotron, Inc.*, 182 B.R. 725 (Bankr.E.D.N.C.1995) (denying priority status to claim for unpaid life insurance premiums).

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Congress enacted the Statute in 1978 in an effort to abrogate two Supreme Court decisions which had construed the terms "wages" and "commissions" of the priority provision of the predecessor statute, the Bankruptcy Act of 1898. *Joint Indus. Bd. of Elec. Indus. v. United States*, 391 U.S. 224 (1968); *United States v. Embassy Rest., Inc.*, 359 U.S. 29 (1959). In those decisions, the Court had held that the wage priority provision of the 1898 Act failed to afford priority status to claims for contributions to bargained-for, union-operated welfare and annuity funds. *Joint Indus.*, 39 U.S. at 228; *Embassy Rest.*, 359 U.S. at 33. Congress, in enacting the Statute, sought to ensure that the employees of bankrupt employers received priority on claims not just for their wages, but also for wage substitutes provided through "employee benefit plan[s]". *S. Star Foods*, 144 F.3d at 715-16 (relying on H.R.Rep. No. 95-595, at 187, 357 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 and S.Rep. No. 95-989, at 69 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5855).

The line of decisions relying on the Statute's legislative history have generally concluded that a workers' compensation plan does not constitute a wage substitute and is not an "employee benefit plan" under the Statute, because workers' compensation is statutorily mandated.[7] *See HLM*

7. None of the decisions taking this view has held that an "employee benefit plan" under the Statute must have resulted from collective bargaining. Indeed, the Sixth Circuit specifically rejected such an assertion, agreeing with the First Circuit's decision in *Saco*, stating: "we do not hold that to qualify for priority under § 507(a)(4) the wage substitute must actually be the product of collective bargaining." *Birmingham-Nashville*, 224 F.3d at 517 (relying on *Saco*, 711 F.2d at 449).

Corp., 62 F.3d at 225; *S. Star Foods*, 144 F.3d at 715; *Birmingham-Nashville*, 224 F.3d at 517. For example, the Sixth Circuit observed that: "[w]orkers' compensation is not a wage substitute; rather, it is an award arising out of a work-related injury *owed* by an employer." *Birmingham-Nashville*, 224 F.3d at 517 (emphasis added). More specifically, because workers' compensation coverage is statutorily mandated, an employer cannot offer its employees higher wages as a substitute for those benefits. *HLM Corp.*, 62 F.3d at 226. Because employees are, in that circumstance, entitled to workers' compensation benefits under law, the Eighth Circuit observed that, "even if the employer were illegally uninsured, the employers' participation in a workers' compensation insurance fund cannot be understood as a true benefit." *Id.*

B.

In order to ascertain which of these competing views to adopt, I must, pursuant to the applicable principles of statutory construction, first decide whether the Statute has a plain and unambiguous meaning. *Newport News Shipbldg.*, 376 F.3d at 248; *see Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 7 (2000) (admonishing that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms") (citations omitted). In enacting the Statute, Congress failed to define the terms "contributions," "employee benefit plan," or "services rendered," as they are used therein, nor has the Supreme Court construed those terms. Where, as here, a statutory provision fails to expressly define the terms to be

assessed, we are obliged to construe them in accordance with their ordinary or natural meaning. *FDIC v. Meyer,* 510 U.S. 471, 476 (1994).

In these circumstances, in order to ascertain whether the Statute is plain or ambiguous, I will assess separately the ordinary and natural meanings of the pertinent statutory terms, *i.e.*, "contributions," "employee benefit plan," and "services rendered." As explained below, although I am sensitive to the principle that bankruptcy priorities are to be interpreted narrowly, *see In re: Merry-Go-Round Enter., Inc.*, 180 F.3d 149, 157 (4th Cir.1999), each of those terms is plain and unambiguous, and the Zurich Claim is therefore entitled to priority status under the Statute.

1.

First of all, an accepted and ordinary meaning of the term "contributions" is that they include sums "paid by an employer to [a] group-insurance fund . . . for employees." *Webster's Third New International Dictionary* 496 (reprint 1993) (1981). Importantly, a contribution need not be a payment that is voluntarily made. *Birmingham-Nashville,* 224 F.3d at 516 (observing that "employer's statutorily mandated payment to an employee benefit plan . . . is no less of a 'contribution' to such a fund simply because it is mandated by statute"). Applying this meaning of the term "contributions" to these circumstances, Howard's unpaid premiums on the Policy constitute sums to be paid by an employer to a group insurance fund for workers'

compensation insurance, and constitute "contributions" within the meaning of the Statute.[8]

2.

Second, the insurance coverage provided by the Policy for Howard's workers' compensation liabilities constitutes an "employee benefit plan" as that term is used in the Statute. As explained below, I reach this conclusion because a workers' compensation plan constitutes an "employee benefit plan" under the Statute, and because the insurance coverage purchased by an employer to cover such a plan is also an "employee benefit plan."[9]

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8. In concluding that the unpaid insurance premiums owed to Zurich are contributions, I necessarily reject the view that a contribution does not include the unilateral purchase of such a product or service, because a contribution, as defined by *Random House,* means *inter alia,* giving "*along with others.*" *Birmingham-Nashville,* 224 F.3d at 515 (quoting *Random House Dictionary of the English Language* 308 (1981) (emphasis added)). Because the bankrupt employer in the *Birmingham-Nashville* proceeding was, like Howard, the sole purchaser of an insurance policy, its unpaid premiums were deemed not to constitute contributions. *Id.* I see this as an overly narrow interpretation of the term "contributions," precluding the existence of a sole contributor and denying priority status to claims for unpaid life, health, and disability insurance premiums. Claims for such unpaid insurance premiums have been accorded priority status by the First Circuit in *Saco,* and by multiple district and bankruptcy courts. *See Saco,* 711 F.2d at 441; *see also supra* Part III.A.1.

9. Certain bankruptcy courts have found the ERISA definition of "employee benefit plan" to be useful in construing the

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a.

A workers' compensation insurance program constitutes a detailed contractual arrangement enabling an employer to provide health, disability, lost-wage, and death benefits to employees who are injured in the course of their employment. As the bankruptcy and district courts recognized in this case, the benefits of workers' compensation coverage plainly inure to those employees who receive payments thereunder. *See* Bankruptcy Opinion at *5 (workers' compensation is "unarguably a benefit for employees"); District Opinion at *11 (workers' compensation is "of great benefit to employees"). Next, a "benefit" is, *inter alia,* "a cash payment provided for under an . . . insurance plan," or "financial help in time of sickness, old age, or unemployment." *Webster's Third* 204. Under West Virginia workers' compensation law, employees receive benefits from an insurance plan, such as that provided by the Policy, to assist them when work-related injuries result in sickness or unemployment. *See Repass v.*

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meaning of the Statute, because, under ERISA, workers' compensation is identified as an "employee benefit plan." *See* 29 U.S.C. §§ 1002(1)-(3), 1003(b); *see, e.g., Allegheny Int'l, Inc. v. Metro. Life Ins. Co. (In re: Allegheny Int'l, Inc.),* 138 B.R. 171, 173-74 (Bankr.W.D.Pa.1992), *aff'd,* 145 B.R. 820 (W.D.Pa.1992). However, "[m]ost federal courts . . . have rejected this reasoning." *Birmingham-Nashville,* 224 F.3d at 517. Importantly, the Supreme Court has held that, for purposes of construing terms found in the Bankruptcy Code, it is inappropriate to incorporate characterizations of a term in another statute absent some congressional indication that this was intended. *United States v. Reorganized CF & I Fabricators of Utah, Inc.,* 518 U.S. 213, 225 (1996). I therefore decline to rely upon the ERISA definition.

Workers' Comp. Division, 569 S.E.2d 162, 168-69 (W.Va. 2002) ("The Act is designed to compensate injured workers . . . in order that injured workers and those who depend upon them for support shall not be left destitute during a period of disability."). Finally, a "plan" constitutes, *inter alia,* "a detailed and systematic formulation of a large-scale campaign or program of action." *Webster's Third* 1729. Applying that definition, workers' compensation insurance, as a detailed arrangement between employees and employers, readily constitutes such a "plan." Workers' compensation insurance is thus an "employee benefit plan" within the plain meaning of that statutory term.

I acknowledge, and respectfully so, that three of the four courts of appeals to face this question have disagreed, taking the view that workers' compensation insurance coverage does not constitute an "employee benefit plan." We are unable to decide such an issue by a poll of the courts, however, and I view the contrary reasoning of those courts as unpersuasive. *See McMellon v. United States,* 387 F.3d 329 (4th Cir.2004) (en banc) (Luttig, J., dissenting) ("Judicial interpretation is not an exercise in poll-taking.") The courts adopting the contrary view have relied on aspects of the Statute's legislative history to interpret the term "employee benefit plan," and they have consistently done so without first deciding that the statutory term is ambiguous. Indeed, the Eighth Circuit concluded that the plain meaning of the term "employee benefit plan" militated against affording priority based upon the legislative history of the Statute. *HLM Corp.,* 62 F.3d at 225 (observing that since Bankruptcy Code did not define term, "the legislative history is instructive and illuminating" without addressing term's plain meaning). The

Tenth Circuit simply concluded that a split in the circuits was sufficient evidence that the statutory provision was ambiguous. *S. Star Foods,* 144 F.3d at 715 ("The split in the circuits is, in itself, evidence of the ambiguity of the phrase 'contributions to an employee benefit plan'. . . ."). [10] And the Sixth Circuit reasoned that the term "employee benefit plan" is ambiguous by first looking, inappropriately, to the Statute's legislative history. *Birmingham-Nashville,* 224 F.3d at 517 (holding that "it is not at all clear" what "employee benefit plan" means and citing *Embassy Restaurant* decision for authority that term is limited to "wage substitutes," without addressing plain meaning). In our view, these decisions fail to heed the Court's admonishment that "when the [Bankruptcy Code's] language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters,* 530 U.S. at 7 (citations omitted).

The language of the Statute is plain and unambiguous—it does not require that compensation received by an employee be a "wage substitute," nor does it exclude an employee benefit plan that is statutorily mandated.[11] Put simply, we

10. I see this point as unpersuasive. As Justice Thomas has aptly observed, "[a] mere disagreement among litigants over the meaning of a statute does not itself prove ambiguity; it usually means that one of the litigants is simply wrong." *Bank of A. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship,* 526 U.S. 434, 461 (1991) (Thomas, J., concurring).

11. *See also In re: Integrated Health Servs., Inc.*, 291 B.R. 611 (Bankr.D.Del.2003) (making comprehensive analysis of statute and pertinent legislative history, and according priority status to claim for unpaid workers' compensation insurance premiums).

are not entitled to require an employee benefit plan to qualify as a wage substitute or to require that participation in such a plan be voluntary, thereby engrafting limitations on statutory provisions in order to "achieve that which Congress is perceived to have failed to do." *United States v. Locke,* 471 U.S. 84, 95 (1985); *see also Pavelic & LeFlore v. Marvel Entm't Group,* 493 U.S. 120, 126 (1989) ("our task is to apply the text, not improve on it"). In sum, the plain language of the Statute accords priority to contributions made to an "employee benefit plan" and, applying the relevant statutory provisions, workers' compensation insurance coverage constitutes such a plan.

b.

Turning next to the question of whether this particular Policy constitutes an "employee benefit plan," within the meaning of the Statute, I conclude that it does. The Policy constitutes such a "plan," in that it is a "detailed and systematic formulation of a large-scale . . . program of action." *Webster's Third* 1729. The district court concluded otherwise, finding that the Policy failed to benefit Howard's employees, and that it benefitted Howard only, because "the insurance is designed to shield Howard from the liability of providing workers' compensation benefits." District Opinion at *10.

Notwithstanding the benefits accruing to Howard under the Policy, the insurance coverage provided thereunder plainly inured to the benefit of Howard's employees. Zurich was obliged to pay Howard's workers' compensation claims and be partially reimbursed by Howard pursuant to the

Policy's provisions. As a result, the Policy directly benefitted the Howard employees who received compensation. *See Ivey v. Great W. Life & Annuity Ins. Co. (In re: Ivey),* 308 B.R. 752, 757 (M.D.N.C.2004) ("the plain language of the statute . . . include[s] priority for an insurance company which has expended its own funds to make the plan work"). That the Policy may also have benefitted Howard is not controlling, because it unquestionably provided an "employee benefit" under the plain and unambiguous meaning of that term.

Nearly all the courts addressing the issue have ruled that claims for unpaid health, disability, and life insurance premiums are entitled to priority status under the Statute, and that those types of insurance constitute a benefit to employees.[12] *See supra* Part III.A.1. And of import here, the coverage provided by workers' compensation insurance is indistinguishable, under the Statute, from those other types of insurance. As Justice Breyer aptly observed in *Saco:* "[t]o allow the insurer to obtain its premiums through priority would seem the surest way to provide employees with the policy benefits to which they are entitled." 711 F.2d at 449.

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12. In resolving this issue I am impressed with the reasoning of the recent decision of the Middle District of North Carolina on the question of whether a claim for unpaid insurance premiums is entitled to priority status. *Ivey,* 308 B.R. at 755-57. That court makes a comprehensive analysis of this issue, concluding that such a claim is entitled to priority status under the Statute. *Id.* at 756 (observing that statutory language "appears to allow priority for insurers or any other parties who make contributions to the plan"). Because the court deemed the "plain language" of the Statute to be unambiguous, it had no reason to "look beyond the text of the statute to the legislative history." *Id.* at 757.

As with health, disability, and life insurance, workers' compensation coverage conveys a benefit to employees, and the Zurich Claim arises from an "employee benefit plan."

3.

Finally, Howard asserts that the meaning of the term "services rendered," as found in the Statute, is limited to those services rendered by its employees and does not include services rendered by an insurer such as Zurich. *See Edward W. Minte Co. v. Franey & Parr (In re: Edward W. Minte Co.)*, 286 B.R. 1, 8-13 (Bankr.D.D.C.2002).[13] It contends that, because the Zurich Claim arises from the provision of insurance coverage by Zurich, rather than from services rendered by Howard's employees, the Claim does not fall within the plain meaning of "services rendered" under the Statute. *Id.*

I reject Howard's contention on this point because it seeks to inappropriately limit the breadth of the relevant term. I am again content to follow Justice Breyer's guidance in *Saco* that insurers may be entitled to priority under the Statute. 711 F.2d at 449. Regardless of whether the term "services rendered" refers to the provision of insurance or is limited to employees' services, the Zurich Claim satisfies this aspect of the Statute. It is only because workers were employed by Howard (and providing services to it) prior to the bankruptcy filing that Howard's obligation to provide

13. Under the *Minte* decision, on which Howard relies for this contention, only employees or administrators of employee benefit plans who represent employee interests may recover under the Statute. 286 B.R. at 10.

insurance and pay the necessary premiums arises. The Zurich Claim thus arises from "services rendered" by Howard's employees, *i.e.*, their services occasioned Howard's obligation to purchase workers' compensation insurance, and by Zurich as well, *i.e.*, providing insurance.[14]

IV.

Pursuant to the foregoing, the Zurich Claim is entitled to priority under the Statute. I therefore concur in the judgment to reverse the decision of the district court and remand for such further proceedings as may be appropriate.

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14. Because the language of the Statute is plain and unambiguous, I decline Howard's invitation to examine its legislative history. Conducting such an analysis "would require a radical abandonment of our long-standing precedents that permit resort to legislative history only when necessary to interpret ambiguous statutory text." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 124 S.Ct. 1587, 1595 (2004).

Appendix A

SHEDD, Circuit Judge, concurring:

While I appreciate Judge King's well-crafted opinion and concur in its result, I base my opinion on a different rationale. Our paths diverge on the issue of whether the phrase "employee benefit plan" in § 507(a)(4) is ambiguous. Judge King finds the individual words of this phrase to be unambiguous, but I find the phrase as a whole to be ambiguous. In ascertaining the meaning of this ambiguous phrase, I rely on specific evidence in the statute's legislative history showing that Congress likely intended to import the definition of the term "employee benefit plan" from ERISA to this particular bankruptcy priority provision. Under ERISA, "employee benefit plan" includes workers' compensation benefit plans. Thus, when Congress enacted § 507(a)(4), it granted priority protection to contributions to workers' compensation plans.

The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (holding that the term "employee" in Title VII is ambiguous in its context). In determining whether a statute is plain or ambiguous, a court must consider the specific language employed, the specific context of that language, and the broader context of the statute as a whole. *Id.* at 341. A statute is ambiguous if its language is susceptible to more than one reasonable interpretation. *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 248 (4th Cir.2004). "If the statutory language is clear and unambiguous, our inquiry ends there." *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 653

(4th Cir.1996). If, however, a statute is ambiguous, resort to legislative history is appropriate. *BedRoc Ltd. v. United States,* 541 U.S. 176, __, 124 S.Ct. 1587, 1595 (2004).

In deciding that § 507(a)(4) is unambiguous, Judge King picks and chooses from accepted dictionary definitions of the words "benefit" and "plan" and concludes that an "employee benefit plan" is any "cash payment provided for under an . . . insurance plan" or "financial help in time of sickness, old age, or unemployment" to an employee that is paid according to "a detailed and systematic formulation of a large-scale campaign or program of action." Although this definition might be one reasonable interpretation of these words, it is not the *only* reasonable interpretation. For instance, in common usage the phrase "employee benefit plan" can refer to a package of "fringe benefits," which may or may not include workers' compensation benefits. *See, e.g.,* 29 C.F.R. § 1625.10(b) (2005) (stating that, for purposes of the Age Discrimination in Employment Act, an "employee benefit plan" is a plan that "provides employees with what are frequently referred to as 'fringe benefits' "); *Employee Fringe Benefits: Tax Policy Issues,* Management Matters, Sept. 1, 1992 (listing the four most common "fringe benefits" as pensions, health insurance, life insurance, and flexible benefit programs). Moreover, the context of the statute suggests that Congress could have intended the phrase "employee benefit plan" to be a term of art having a specific meaning different from the sum of what these three words mean individually. Accordingly, because the term "employee benefit plan" is susceptible to more than one reasonable interpretation, it is appropriate to consider the legislative

history of § 507(a)(4) to determine what Congress intended by using this particular language. *See BedRoc,* 124 S.Ct. at 1595.

As originally introduced in 1975, the new priority for "employee benefit plans" included "allowed claims for contributions to *pension, insurance, or similar employee benefit plans* . . . ." H.R. 31, 94th Congress (1975) (emphasis added). In hearings before the Judiciary Committee of the United States House of Representatives, one important witness—a union official representing more than a dozen affiliated unions and several million tradesmen—suggested that the legislation could be interpreted too narrowly and should therefore be amended "so as not inadvertently to exclude certain other types of plans." Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong. 2452 (1976). To broaden the coverage of the priority, this witness urged Congress to delete the words "pension, insurance, or similar" and instead parallel the language of ERISA. *Id.* Thus, "[t]he contributions for which priority treatment should be granted should be any contributions to an employee benefit plan as defined in *ERISA § 3(3).*" *Id.* at 2455. (emphasis added).

The priority was enacted into law two years later as part of the Bankruptcy Reform Act of 1978, Pub.L. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. § 507(a)(4)). Congress enacted the exact wording proposed in the House Judiciary Committee hearing two years earlier, so that the priority applies to "allowed unsecured claims for contributions to an employee benefit plan." 11 U.S.C. § 507(a)(4).

In this particular instance, the best evidence as to what Congress intended by incorporating the term "employee benefit plan" comes not from attempting to ascertain the overriding purposes and aims of the legislation.[1] Instead, we have a direct indication from the legislative history that Congress intended to give this particular term the same meaning that it had given to that same term just four years earlier when it enacted ERISA. *See* Employee Retirement Income Security Act of 1974, Pub.L. 93-406, 88 Stat. 829. Accordingly, I conclude that Congress intended the phrase "employee benefit plan" in the bankruptcy priority provision to have the same meaning that it has in ERISA.[2]

---

1. I note, however, that my approach is also consistent with the Congressional purpose and aim of the legislation. Language in the House Committee Report explaining the purpose of the new priority provision suggests that workers' compensation plans are entitled to priority. That Report states that the new priority will cover contributions and payments to plans including "health insurance programs, life insurance plans, pension funds, and all other forms of employee compensation that is not in the form of wages." H.R.Rep. No. 95-595, at 6148 (1977). Under this very broad language, workers' compensation would qualify as "employee compensation that is not in the form of wages."

2. Relying on *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996), Judge King rejects the ERISA definition because it is "inappropriate to incorporate characterizations of a term in another statute absent some congressional indication that this was intended." This contention ignores the indication of Congress's intent in the legislative history. The plain facts that (1) Congress was urged to make § 507(a)(4) consistent with ERISA and (2) Congress subsequently amended the provision to employ the very same term that is used in ERISA provides "some congressional

(Cont'd)

Appendix A

ERISA § 3(3) defines the term "employee benefit plan" to mean "an *employee welfare benefit plan* or an employee pension benefit plan. . . ." 29 U.S.C. § 1002(3) (emphasis added). An "employee welfare benefit plan" is:

> any plan, fund, or program . . . established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment. . . .

29 U.S.C. § 1002(1). Based on these definitions, the workers' compensation insurance plan at issue in this case qualifies as an "employee benefit plan." The plan at issue was established by Howard Delivery Service through the purchase of insurance and was maintained for the purpose of providing benefits in the event of sickness, accident, disability or death of the employees.[3]

(Cont'd)

indication" that "employee benefit plan" should have the same meaning in both statutes. Simply, Congress used a special term it had used in the recent past with knowledge of what that term meant.

3. ERISA § 4(b)(3) further confirms that the term "employee benefit plan" includes workers' compensation plans. This code section provides:

(Cont'd)

Appendix A

Because Congress enacted an ambiguous statute, we must ascertain from the statute's legislative history which types of plans Congress meant to include in this new bankruptcy priority. In my view, the best evidence reveals that Congress intended the term "employee benefit plan" in § 507(a)(4) to share the same meaning as "employee benefit plan" under ERISA. A workers' compensation insurance plan is an "employee benefit plan" under ERISA, and it necessarily follows that a workers' compensation plan qualifies as an "employee benefit plan" under § 507(a)(4) of the Bankruptcy Code. Accordingly, I concur with Judge King that the Zurich Claim is entitled to priority and that the judgment of the district court should be reversed.

(Cont'd)

> (b) The provisions of this subchapter shall not apply to any *employee benefit plan* if—
>
> . . .
>
> (3) such plan is maintained *solely* for the purpose of complying with applicable *workmen's compensation* laws . . . .

29 U.S.C. § 1003(b)(3) (emphasis added). In other words, all workers' compensation plans are "employee benefit plans" under ERISA's definition, but ERISA does not govern all "employee benefit plans," including some workers' compensation plans. *See PPG Indus. Pension Plan v. Crews*, 902 F.2d 1148, 1151 (4th Cir.1990) (deciding that ERISA applies to company's employee benefit plan providing workers' compensation benefits because it was not maintained solely for the purpose of complying with West Virginia's workers' compensation laws).

Appendix A

NIEMEYER, Circuit Judge, dissenting:

The sole question in this appeal is whether the claim of Zurich American Insurance Company filed against the estate of Howard Delivery Service, Inc., the debtor in bankruptcy, for unpaid workers' compensation insurance premiums is given priority by § 507(a)(4) of the Bankruptcy Code. Because such premiums are plainly not—as the statute requires they must be—"contributions to an employee benefit plan arising from services rendered," 11 U.S.C. § 507(a)(4), I would affirm the judgment of the district court denying priority for Zurich's claim.

In holding that claims for unpaid workers' compensation insurance premiums enjoy the same priority as claims for unpaid employee fringe benefits, the judgment of the majority widens a split among the circuits, joining the Ninth Circuit as the only circuit that has so held. *See Employers Ins. of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605 (9th Cir.1993). The other three circuits that have considered this issue have held that claims for unpaid workers' compensation insurance premiums do not fall within the statutory language of § 507(a)(4) and therefore do not enjoy the priority afforded by that section. *See Travelers Prop. Cas. Corp. v. Birmingham-Nashville Express, Inc. (In re: Birmingham-Nashville Express, Inc.)*, 224 F.3d 511 (6th Cir.2000); *State Ins. Fund v. Southern Star Foods, Inc. (In re: Southern Star Foods, Inc.)*, 144 F.3d 712 (10th Cir.1998); *Employers Ins. of Wausau, Inc. v. HLM Corp. (In re: HLM Corp.)*, 62 F.3d 224 (8th Cir.1995). Because I believe that the decisions of these three circuits better capture the plain meaning of § 507(a)(4), I would join them.

Appendix A

I

When construing a statutory provision, we begin with an analysis of the statute's language. *See, e.g., Landreth Timber Co. v. Landreth,* 471 U.S. 681, 685 (1985). If the language is unambiguous and "the statutory scheme is coherent and consistent," we apply the statute as written. *Robinson v. Shell Oil Co.,* 519 U.S. 337, 340 (1997) (quoting *United States v. Ron Pair Enterprises,* 489 U.S. 235, 240 (1989)) (internal quotation marks omitted). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." 519 U.S. at 341.

Moreover, in construing provisions of the Bankruptcy Code, we keep in mind its overriding objective of providing to creditors equal distribution of a debtor's limited resources. *See Isaac v. Temex Energy, Inc. (In re Amarex, Inc.),* 853 F.2d 1526, 1530 (10th Cir.1988). Because of this broad equitable purpose, statutory priorities must be narrowly construed. *See Travelers Prop. Cas. Corp.,* 224 F.3d at 517; *New Neighborhoods, Inc. v. W. Va. Workers' Comp. Fund,* 886 F.2d 714, 719 (4th Cir.1989); *Isaac,* 853 F.2d at 1530. Stating this principle as a rule of statutory construction, the claims of a class of creditors may receive preferential or priority treatment from bankruptcy courts *only* when authorized by Congress in clear and unequivocal terms. *See United States v. Embassy Restaurant, Inc.,* 359 U.S. 29, 31, 33 (1959). It follows that if a particular type of unsecured claim is not clearly and unequivocally listed in 11 U.S.C. § 507(a), which enumerates the Bankruptcy Code's priorities,

then Congress had no intention of giving the claim priority, *see Nathanson v. NLRB,* 344 U.S. 25, 29 (1952); *Employee Transfer Corp. v. Grigsby (In re White Motor Corp.),* 831 F.2d 106, 110 (6th Cir.1987), and we would not be free to create a new priority, *see Caminetti v. United States,* 242 U.S. 470, 485 (1917).

II

In this case, we consider whether 11 U.S.C. § 507(a)(4) *clearly* grants priority to claims for unpaid workers' compensation insurance premiums. Before turning to the specific language of § 507(a)(4), it is useful to give context to the enactment of that section, *see Robinson,* 519 U.S. at 341, which in this case provides substantial assistance in understanding the statutory language employed by Congress.

Congress enacted § 507(a)(4) in 1978 specifically to overrule the holdings in two Supreme Court cases: *United States v. Embassy Restaurant, Inc.,* 359 U.S. 29 (1959), and *Joint Industry Board v. United States,* 391 U.S. 224 (1968). In *Embassy Restaurant,* the Court construed the predecessor to § 507(a), 11 U.S.C. § 104(a)(2) (repealed 1978), which established a priority in bankruptcy for claims of "wages . . . due to workmen," and held that a claim for contributions by an employer to a union welfare plan owed under the terms of a collective bargaining agreement did not constitute "wages . . . due to workmen." 359 U.S. at 30-31. Trustees of the welfare plan, which had been formed to maintain life insurance, weekly sick benefits, hospital benefits, and other advantages for union members, *id.* at 30, argued that "since unions bargain for these contributions as though they were

wages and industry likewise considers them as an integral part of the wage package, they must in law be considered wages," *id.* at 33 (internal quotation marks omitted). Rejecting this argument, the Supreme Court held that fringe benefits payable through a plan "cannot be treated as being within the clear, unequivocal language of 'wages . . . due to workmen.'" *Id.*

Likewise, in *Joint Industry Board,* the Supreme Court, following its decision and rationale in *Embassy Restaurant,* held that a claim for an employer's unpaid contributions to an employees' annuity plan established by a collective bargaining agreement was not a claim for "wages . . . due to workmen" under 11 U.S.C. § 104(a)(2) (repealed 1978). *See* 391 U.S. at 226-28.

In response to these two decisions, Congress enacted § 507(a)(4) to give priority status to claims for such fringe benefits—the "contributions" to employee benefit plans referred to in *Embassy Restaurant* and *Joint Industry Board.* As Congress explained:

Paragraph (4) overrules *United States v. Embassy Restaurant,* which held that fringe benefits were not entitled to wage priority status. The bill recognizes the realities of labor contract negotiations, under which wage demands are often reduced if adequate fringe benefits are substituted. The priority granted is limited to claims for contributions to employee benefit plans such as pension plans, health or life insurance plans, and others, arising from services rendered. H.R.Rep. No. 95-595, at 357 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 (internal citation omitted). That

purpose is now captured in the text of § 507(a)(4), which reads:

> (a) The following expenses and claims have priority in the following order:
>
> * * *
>
> (4) Fourth, allowed unsecured claims for contributions to an employee benefit plan arising from services rendered within 180 days [of the filing of a petition]. . . .

In this context, we now turn to the specific question of whether a claim for unpaid premiums for workers' compensation insurance is clearly and unequivocally a claim for "contributions to an employee benefit plan arising from services rendered."

III

In defining the priority granted in § 507(a)(4), Congress used the language the Supreme Court used to describe fringe benefits in *Embassy Restaurant* when it excluded them from "wages . . . due to workmen." *See* 359 U.S. at 29-30 (framing the issue as "whether contributions to an employer welfare fund which are required by a collective bargaining agreement are entitled to priority"). Although Congress could have used broader terms in defining the priority, it selected the terms (1) "contributions" to an (2) "employee benefit plan," and related them to (3) "services rendered" by the employee. These three phrases taken together connote the very fringe

benefits rejected in *Embassy Restaurant* and *Joint Industry Board*. Of course, this is not surprising, because 11 U.S.C. § 507(a)(4) was enacted specifically to overrule these two cases.

The question here is whether a claim for unpaid insurance premiums falls within the class of claims described by Congress as claims for unpaid "contributions to an employee benefit plan arising from services rendered." Stated more succinctly, is workers' compensation coverage a fringe benefit? Several compelling reasons convince me that a claim for unpaid insurance premiums is quite distinct from unpaid "contributions to an employee benefit plan arising from services rendered" and thus is not accorded priority status under the statute.

First, workers' compensation liability is an *employer's* liability imposed by statute in lieu of tort liability. *See Mandolidis v. Elkins Indus., Inc.*, 246 S.E.2d 907, 911 (W.Va. 1978) (noting that West Virginia's "Workmen's Compensation Act was designed to remove negligently caused industrial accidents from the common law tort system") (emphasis omitted); *Belcher v. J.H. Fletcher & Co.*, 498 F.Supp. 629, 630-31 (S.D.W.Va.1980) (same). Thus, rather than constituting the payment of a "benefit" to employees, insurance premiums for workers' compensation are the payments due from an employer in respect to its statutory *liability* and its employees' statutory *rights*. Such payments are not thought to be "contributions," a term that involves a notion of voluntariness. *See Webster's Third New International Dictionary* 496 (Merriam Webster Inc. ed., 1993) (defining a "contribution" as "a sum or thing

voluntarily contributed"). Thus, while payments to a plan for fringe benefits are considered "contributions," payments made to discharge a statutorily mandated liability are not.

Second, the *payment of premiums* to an insurance company for the issuance of a workers' compensation insurance policy is not a contribution "to an employee benefit plan" as that term is used in the statute. Although it would be correct to categorize some employer-funded insurance policies as "employee benefit plans," that categorization is fitting only when the employer voluntarily provides the insurance policy as a fringe benefit to its employees or when the policy is negotiated between the employer and the employees as part of a collective bargaining agreement. A plan arrived at through those methods is quite different from a policy of insurance issued to discharge the statutorily mandated *liability* of an employer for workplace injuries.

Third, the payment of premiums by an employer to an insurance company for workers' compensation insurance coverage is not a surrogate for the payment of wages to employees, as is embraced by the notion of a fringe benefit. *See, e.g., Embassy Restaurant,* 359 U.S. at 32-33. Section 507(a)(4) gives priority *only* to contributions that are considered fringe benefits in the sense that they arise from the employees' "services rendered." The claim for an unpaid insurance premium is not a claim for a contribution arising from "services rendered." While premiums for workers' compensation insurance might be computed by considering the number of employees covered on any given day, the premium is not linked to the "services rendered" by the employees as is required to qualify for priority status under § 507(a)(4).

In short, the plain language of § 507(a)(4), which gives priority to claims for unpaid "contributions to an employee benefit plan arising from services rendered," does not cover claims for unpaid insurance premiums charged to cover the statutory liability of the employer to its employees. The unpaid insurance premium is not an unpaid *contribution;* it is not an unpaid contribution *to an employee benefit plan;* and it does not arise out of an employee's *services rendered* in that it is not a *wage surrogate.*

To read § 507(a)(4) as expansively as do the opinions of Judge King and Judge Shedd not only disregards the explicit language of the statute, but such a reading also violates the underlying ground rules for construing priorities under the Bankruptcy Code. "The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate," and "if one claimant is to be preferred over others, the purpose should be clear from the statute." *Embassy Restaurant,* 359 U.S. at 31 (internal quotation marks and citation omitted); *see id.* at 33 (requiring a priority to be "within the clear, unequivocal language" of the statute). I submit it is not clear that § 507(a)(4) intends to give priority to claims for unpaid insurance premiums and therefore we are not free to create such a priority.

To make the construction advanced by his concurring opinion appear reasonable, Judge King has cobbled together selected dictionary definitions and portions of definitions. He has taken the statutory words out of context to stretch them beyond their plain meaning. This approach suffers, I respectfully submit, from the same flaw as does the indiscriminate use of statistics. But even when taking this

approach—an approach that also violates the mandate to construe bankruptcy priorities narrowly—it is facially irrational to assert that payments for mandatory workers' compensation liability fall within the *plain meaning* of the term "contributions to an employee benefit plan arising from services rendered."

Judge Shedd's opinion, concurring in the judgment, aptly notes that Judge King's opinion "picks and chooses from accepted dictionary definitions" to arrive at "one reasonable interpretation," but not "the *only* reasonable interpretation." But Judge Shedd's opinion then proceeds to construe "employee benefit plan" in § 507(a)(4) broadly, employing the definition given for that phrase in ERISA, 29 U.S.C. § 1002(3). Applying that definition out of context, Judge Shedd concludes that insurance for workers' compensation benefits is an "employee benefit plan" that enjoys priority under the Bankruptcy Code.

Judge Shedd's opinion well notes that ERISA explicitly exempts from its coverage any plan "maintained solely for the purpose of complying with applicable workmen's compensation laws." What Judge Shedd's opinion fails to address, however, is the analogous limitation made in the Bankruptcy Code. While § 507(a)(4) gives priority to claims made against the estate for "contributions to an employee benefit plan," that priority is *not* afforded with respect to every "employee benefit plan." The priority is extended only with respect to contributions to employee benefit plans "arising from services rendered." The phrase "arising from services rendered" indicates that not all employee benefit plans are given priority, but only those that function as wage

surrogates. This is an especially important phrase in context because Congress enacted the priority to overrule the Supreme Court's earlier decisions in *Embassy Restaurant* and *Joint Industry Board.*

For the reasons given, I would join the three circuits that have construed § 507(a)(4) not to give priority to claims for unpaid workers' compensation insurance premiums, *see Travelers Prop. & Cas. Corp.,* 224 F.3d at 517; *State Ins. Fund,* 144 F.3d at 717; *Employers Ins. of Wausau,* 62 F.3d at 226-27, expressing regret that we are now widening the split among the circuits.

APPENDIX B — MEMORANDUM OPINION AND ORDER AFFIRMING ORDER OF THE BANKRUPTCY COURT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA DATED DECEMBER 22, 2003 AS CORRECTED DECEMBER 23, 2003

IN THE THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 3:03CV61
(BK No. 02-30289)

IN RE:

HOWARD DELIVERY SERVICE, INC.,

Debtor.

HOWARD DELIVERY SERVICE,

Debtor/Appellee.

v.

ZURICH AMERICAN INSURANCE COMPANY,

Movant/Appellant.

Appendix B

MEMORANDUM OPINION AND ORDER AFFIRMING ORDER OF THE BANKRUPTCY COURT

I. *Procedural History*

On January 30, 2002, appellee, Howard Delivery Service, Inc. ("Howard"), filed a voluntary petition for relief under Chapter 11 of the United State Bankruptcy Code in the United States Bankruptcy Court for the Northern District of West Virginia. On March 17, 2003, Howard filed a request for estimation of the unliquidated claim of appellant Zurich American Insurance Company ("Zurich"). In response to the estimation motion, Zurich filed two amended proofs of claim listing "insurance premiums" as the bases. One claim was an unsecured nonpriority claim in the amount of $595,358.00, and the other was an unsecured priority claim in the amount of $410,215.00. Zurich claimed priority status for the second claim under 11 U.S.C. § 507 (a) (4), which allows priority for contributions to employee benefit plans.

On May 22, 2003, Zurich filed a memorandum in support of priority treatment of the second claim. On June 17, 2003, Howard filed its memorandum in opposition to the priority status claimed by Zurich, to which Zurich replied. On July 15, 2003, the Bankruptcy Court issued a memorandum opinion ordering that Zurich's proof of claim be modified from an unsecured priority claim to an unsecured nonpriority claim.

On July 25, 2003, Zurich filed a motion with the Bankruptcy Court for leave to appeal. Zurich submitted its

opening brief to this Court on October 6, 2003. Howard responded to this brief, and Zurich replied. This Court has now considered all of the matters before it and is of the opinion that the order of the Bankruptcy Court should be affirmed in its entirety.

II. *Jurisdiction and Standard of Review*

This Court has jurisdiction over this bankruptcy appeal pursuant to 28 U.S.C. § 158(a) and Federal Rule of Bankruptcy Procedure 8001. This Court reviews the Bankruptcy Court's conclusions of law pursuant to a *de novo* standard of review and its findings of fact for clear error. *See In re NVR*, 189 F.3d 442, 448 (4th Cir. 1999); *see also* Fed. R. Bankr. P. 8013.

III. *Facts*

In 1997, Zurich and Howard entered into an agreement wherein Zurich was to provide Howard with workers' compensation, employer's liability, and automobile liability policies. These policies took effect on July 1, 1997 and remained active until January 22, 2002, when Howard cancelled the policies. Under the terms of the agreement, Howard was required to reimburse Zurich for all losses incurred under the automobile liability policies up to $150,000.00 and all losses under the workers' compensation policies up to $250,000.00. The agreement also allowed Zurich to hold other unliquidated claims against Howard.

Zurich contends that it currently holds a total allowed claim against Howard in the amount of $1,005,573.00, and

argues that $410,215.00 of this claim is entitled to priority status. Zurich seeks priority treatment under 11 U.S.C. § 507(a)(4) for the portion of its claim attributed to unpaid amounts due relating to health, disability, and death benefits provided to Howard's employees under the workers' compensation insurance policies. On appeal, Zurich requests that this Court: (1) grant Zurich a total allowed claim of $1,005,573.00; (2) grant Zurich an allowed unsecured priority claim pursuant to 11 U.S.C. § 507(a)(4), in an amount to be determined on remand, for amounts owed with respect to the workers' compensation policies arising in the 180 days prior to the petition date; (3) grant Zurich an allowed unsecured nonpriority claim for the remainder of the total claim; and (4) grant such other relief as the Court deems appropriate.

III. *Applicable Law*

Title 11, United States Code, Section 504 states in pertinent part:

> (a) The following expenses and claims have priority in the following order:
>
> . . .
>
> (4) Fourth, allowed unsecured claims for contributions to an employee benefit plan –
>
> (A) arising from services rendered within 180 days before the date of the filing of the petition or

> the date of the cessation of the debtor's business, whichever occurs first . . .

11 U.S.C. § 507(a)(4) (2000).

Section 504(a)(4) was drafted in response to the Supreme Court's holdings in two important cases: *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29 (1959), and *Joint Industry Board v. United States*, 391 U.S. 224 (1968). The Court in these cases held that the predecessor of section 504(a), 11 U.S.C. § 104 (a) (2) (repealed 1978), did not provide priority status to claims for unpaid employer contributions to union workers' welfare and annuity plans. *See Joint Indus.*, 381 U.S. at 228-29; *Embassy Rest.*, 359 U.S. at 33-35. In response to these holdings, Congress enacted section 504 (a) to entitle these types of plans to priority status. It is now well-established that unsecured claims for unpaid contributions to union-operated employee benefit plans are entitled priority under section 507(a)(4). *See Travelers Prop. & Cas. Corp. v. Birmingham-Nashville Express, Inc.*, 224 F.3d 511, 517 (6th Cir. 2000).

However, because Congress did not define the terms "contribution," "employee benefit plan," or "services rendered" for the purposes of this statute, questions regarding the scope of section 507 (a) (4) have arisen. *See, e.g., Travelers Prop. & Cas. Corp.*, 224 F.3d at 514-15; *In re Integrated Health Servs., Inc.*, 291 B.R. 611, 613 (D. Del. 2003). Specifically, there is a split among the circuits regarding whether workers' compensation insurance premiums constitute "contributions to an employee benefit plan" under section 507(a)(4). The First and the Ninth

Appendix B

Circuits have held that workers' compensation insurers are entitled to priority status, while the Sixth, Eighth, and Tenth Circuits have found that such insurers are not entitled to benefit from this section. *Compare Employers Ins. of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605, 607 (9th Cir. 1993) (finding that workers' compensation insurance is an "employee benefit plan" under § 507(a)(4)), *and In re Saco Local Dev. Corp.*, 711 F.2d 441 (1st Cir. 1983) (same), *with Travelers Prop. & Cas. Corp*, 224 F.3d at 517 (finding that workers' compensation premiums are not "wage substitutes" and therefore do not fit the § 507(a)(4) priority), *and State Ins. Fund v. Star Foods*, 144 F. 3d 712 (10th Cir. 1998) (same), *and In re HLM Corrp.*, 62 F.3d 224 (8th Cir. 1995) (same). The Fourth Circuit has not addressed this question.

A. *Plain Meaning of the Statute*

One of the issues dividing the circuits is whether the plain meaning of section 507(a)(4) supports priority status for workers' compensation insurers. The courts supporting such priority status have found that the plain language of the statute supports their position, as "underlying payments to injured employees from workers' compensation fit the archetypical examples of employee benefit plans such as health insurance, disability, and pension plans." *In re Integrated Health Servs.*, 291 B.R. at 613.

In contrast, courts disallowing priority status have generally held that the plain meaning of the statute does not support such inclusion because "the claim for unpaid insurance premiums [does] not arise from a 'service.' Instead, it arises from the debtor's failure to pay its insurer. This is

no different from any other claim for a trade debt." *In re HLM Corp.*, 165 Bankr. 38, 41 (Bankr. D. Minn. 1994).

B. *Legislative History*

The two sides also disagree in their interpretation of the statute's legislative history. Cases supporting priority for workers' compensation insurers have found that "there is no clearly expressed legislative intent to exclude workers' compensation benefits from the plain language of section 507(a)(4)." *In re Integrated Health Servs.*, 291 B.R. at 614. These cases have, further reasoned that there is

> no reason for concluding that Congress intended to deny priority to workers' compensation benefit plans while granting the same statutory priority to other plans providing benefits to employees. Nor can we conclude that Congress intended to distinguish between benefit plans that are contractually promised to employees and those that are statutorily required. The purpose of priority, to protect the solvency of benefit plans, is present in both situations.

Plaid Pantries, 10 F.3d at 607.

However, courts finding that section 507(a)(7) priority is not applicable have interpreted the legislative history much differently. They have followed the general principle that "statutory priorities under section 507 of the Code are to be narrowly construed." *In re HLM Corp.*, 165 B.R. 38, 39

(Bankr. D. Minn. 1994). Applying this standard to the legislative history of the Act, they have reasoned that

> [t]he theory behind § 507(a)(4) is that, in the realities of collective bargaining agreement negotiations, employees may give up certain claims for wages in exchange for fringe benefits. As a result, the fringe benefits earned 180 days before the filing of a bankruptcy petition should be entitled to priority in the same way and for the same reason that wages are entitled to priority. H. R. Rep. No. 595, 95th Cong., 1st Sess. 357 (1977), [reprinted in] U.S.C.C.A.N. 1978, 5787. The legislative history makes it clear that § 507(a)(4) covers those types of benefits that typically are bargained for in the employer-employee setting whether as part of a collective bargaining arrangement or otherwise.

In re HLM Corp., 165 Bankr. at 41. On this basis, these courts have found that "the term 'employee benefit plan' is limited to wage substitutes." *Travelers Prop. & Cas. Corp.*, 224 F.3d at 517.

Because payments for workers' compensation policies are not bargained-for substitutes for wages, but rather are methods employers use to safeguard their statutory obligations, these courts have concluded that they do not qualify for priority status under this framework. *See In re HLM Corp.*, 62 F.3d at 226; *State Ins. Fund v. Southern Star Foods*, 144 F.3d 712, 716 (10th Cir. 1998) ("[W]orkers' compensation is not an employee benefit plan because the

coverage benefits the employer at least as much, if not more, than the employee."). As articulated by one court,

> Section 507(a)(4) is not to assure the insurance industry that insurers will be paid for their money. It is to ensure that the employees will receive the benefits they bargained for in the course of accepting employment with a debtor. The employees . . . will receive or have received their benefits regardless of whether the insurer is paid its premium.

In re HLM Corp., 165 Bankr. at 42.

IV. *Discussion*

The United States Bankruptcy Court for the Northern District of West Virginia, in declining to afford Zurich priority status, concluded that

> Congress intended 507(a)(4) to overrule *Embassy Restaurant* and, as can be determined from . . . its history, intended the section's priority treatment to be tied to bargained-for, wage-substitution-type benefits. A debtor's unpaid workers' compensation insurance premiums are not afforded priority treatment. While these premiums are unarguably a benefit for employees, they are required by statute and thus are not considered "an employee benefit plan" under the Bankruptcy Code.

In re Howard Delivery Service, Inc., No. 02-30289, slip op. at 5 (Bankr. N.D. W. Va. July 15, 2003).

Appendix B

In its opening brief, Zurich argues that the Bankruptcy Court erred in: (1) relying on the legislative history of 11 U.S.C. § 507(a)(4) to support a decision that is in contradiction to the plain, ordinary meaning of the language of the statute itself; and (2) ruling that priority under 11 U.S.C. § 507(a)(4) is available only for "bargained for" benefits. Zurich argues that the "better reasoned cases . . . hold that such premiums are entitled to priority under section 507(a)(4)." Appellant's Opening Br. at 11.

In its response, Howard argues that, while there is a split among the circuits regarding whether unpaid premiums for insurance covering workers' compensation liability should be treated as priority claims, the greater weight of authority refuses to afford such priority to these premiums. Moreover, Howard argues that claims by insurers for unpaid insurance premiums, even if the premiums are for coverage under an employee benefit plan, are not entitled to section 507(a)(4) priority because they arise from the sale of insurance on credit, and not from the services provided by employees. Finally, Howard disagrees with Zurich's assertion that the Bankruptcy Court improperly examined the legislative history of the statute. Howard argues that the analysis was appropriate because the relevant statutory language is ambiguous.

Upon careful analysis of this issue, this Court agrees with the finding of the Bankruptcy Court that Zurich is not entitled to the priority afforded by section 507(a)(4). To hold otherwise is to excessively broaden the scope of the statute. An agreement by a third party to provide workers' compensation insurance to an employer should not be

considered a "contribution" to an employee benefit plan. Zurich entered into an agreement with Howard to provide insurance upon the payment of premiums. Its relationship could easily be construed as a protector of the interests of Howard, the employer, rather than Howard's employees, because the insurance is designed to shield Howard from the liability of providing workers' compensation benefits.

Moreover, the distinction between such statutorily-mandated insurance programs as workers' compensation and contractually bargained-for benefits such as life and health insurance should not be casually rejected. As noted by the Eighth Circuit, "workers' compensation insurance is a system mandated by statute. Employers cannot offer (and employees cannot accept) higher wages as a substitute for workers' compensation benefits." *In re HLM Corp.*, 62 F.3d at 225. For this reason, such premiums should not be construed as "fringe benefits" under the statute. In explaining the purpose and effect of section 507(a)(4), Congress stated:

> Paragraph (4) overrules *United States v. Embassy Restaurant*, which held that fringe benefits were not entitled to wage priority status. *The bill recognizes the realities of labor contract negotiations, under which wage demands are often reduced if adequate fringe benefits are substituted.* The priority granted is limited to claims for contributions to employee benefit plans such as pension plans, health or life insurance plans, and others, arising from services rendered after the earlier of one year before the bankruptcy case and the total of all contributions payable under this paragraph . . .

Appendix B

H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 187 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 (emphasis added). Workers' compensation, while of great benefit to employees, cannot be considered a wage substitute. Thus, the premiums due to the workers' compensation insurer should not be encompassed within the "fringe benefits" that are entitled to priority under section 507(a)(4).

V. *Conclusion*

For the reasons stated above, this Court hereby AFFIRMS the decision of the United States Bankruptcy Court for the Northern District of West Virginia. This civil action is hereby STRICKEN from the active docket of this Court.

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit a copy of this memorandum opinion and order to counsel of record herein. Pursuant to Federal Rule of Civil Procedure 58, the Clerk is DIRECTED to enter judgment on this matter.

DATED: December 22, 2003

s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA ENTERED JULY 15, 2003

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA

BK NO. 02-30289

IN RE

HOWARD DELIVERY SERVICE,
INCORPORATED,

Debtor(s).

MEMORANDUM OPINION

Facts[1]

On January 30, 2002, Howard Delivery Service, Inc. ("Howard") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. On May 9, 2002, Zurich American Insurance Company ("Zurich") filed two proofs of claim listing "insurance premiums" as the bases. Zurich's first claim[2] was classified as an unsecured priority claim and administrative expense and its second[3] was classified as an

1. Many of the facts not relevant to *the issue* presented are omitted for clarity.

2. Designated by the Court as Proof of Claim number 120.

3. Designated by the Court as Proof of Claim number 121.

unsecured nonpriority claim. The amounts of both claims were listed as "unliquidated." In mid-March 2003, Howard moved the Bankruptcy Court to estimate the allowance of the unliquidated claims.

On March 28, 2003, Zurich filed amended claims. The unsecured priority claim was amended[4] to list $410,215 as the amount and it was classified as "contributions to an employee benefit plan." The second claim was amended[5] to list $529,358 as the amount. Howard takes issue with the amount of Zurich's $410,215 unsecured priority claim and, because the basis of the claim is unpaid workers' compensation insurance premiums, with its classification as "priority" under 11 U.S.C. § 507(a)(4). As an essential first step in resolving both issues, this opinion addresses only Zurich's classification of its first proof of claim as "priority" for "contributions to an employee benefit plan" under § 507(a)(4).

Discussion

Section 507(a)(4) of the Bankruptcy Code reads:

> (a) The following expenses and claims have priority in the following order:
>
> * * *

---

4. Designated by the Court as Proof of Claim number 306.

5. Designated by the Court as Proof of Claim number 307.

(4) Fourth, allowed unsecured claims for contributions to an employee benefit plan

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of

(i) the number of employees covered by each such plan multiplied by $4,650; less

(ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

Although the Fourth Circuit has not addressed the issue of whether premiums for workers' compensation insurance policies are afforded § 507(a)(4) priority, four other circuits have. The Sixth, Eighth, and Tenth Circuits all agree that workers' compensation insurance is not an employee benefit plan under § 507(a)(4). *Travelers Property Casualty Corp. v. Birmingham-Nashville Express, Inc.*, 224 F.3d 511 (6th Cir. 2000); *Employers Insurance of Wausau, Inc. v. Ramette (In re HLM Co.)*, 62 F.3d 224 (8th Cir. 1995); *State Insurance Fund v. Southern Star Foods, Inc.*, 144 F.3d 712 (10th Cir.

1998). After careful study of the legislative history of § 507(a)(4), all three circuit courts concluded that it was inserted into the Code by Congress to overrule *United States v. Embassy Restaurant*, 359 U.S. 29, 3 L. Ed. 2d 601, 79 S. Ct. 554 (1959), which failed to give priority wage treatment to union-negotiated employee benefits. *Birmingham-Nashville Express*, 244 F.3d at 514; *In re HML Corp.*, 62 F.3d at 225; *Southern Star*, 144 F.3d at 715-16 (citing H.R. Rep. No. 95-595, at 187 (1978) and S. Rep. No. 95-989, at 69 (1978).). Each court distinguished fringe benefits (bargained for wage-equivalents) from workers' compensation premiums (statutory obligations),

One circuit facing the same issue has failed to take a similar view. In *Employers Insurance of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605, 607 (9th Cir. 1993), the earliest of the cases, the Ninth Circuit addressed but failed to offer meaningful recognition to the distinction between negotiated wage-equivalent benefits and statutorily mandated workers' compensation benefits. The *Plaid Pantries* court did admit that the legislative history of § 507(a)(4) shows that Congress added the sub-section to protect "fringe benefits," but had little difficulty in including workers' compensation insurance premiums as § 507(a)(4) priority "contributions." *Id.* In reviewing the case later, the Eighth Circuit criticized that by rejecting the "distinction between statutorily mandated insurance programs, such as workers' compensation, and contractually arrived at insurance plans, such as those for life and health" the *Plaid Pantries* court "excessively broadened the reach of the Code language in question." *In re HLM Corp.*, 62 F.3d at 227.

Appendix C

Two cases within the Fourth Circuit have addressed issues related to § 507(a)(4), but help very little in the matter here. First, in *Aetna Life Insurance Co. v. The Mantaldo Corp.*, 232 B.R. 853 (M.D.N.C. 1997), the court found that group life and health insurance premiums were to be afforded § 507(a)(4) priority treatment. Although that decision discussed the distinctions between those premiums and workers' compensation *premiums in light of In re HLM Corp.* and *Plaid Pantries*, the court was not called upon to rule on the issue. Second, in *Field v. Maryland Motor Truck Assn*, 259 B.R. 89 (Bankr. D. Md. 2001), the trustee initiated an adversary proceeding and avoided preferentially paid workers' compensation premiums under § 547(b). In the paragraph *preceding* the grant of relief to the plaintiff/trustee, the court opined that "[p]erhaps the defendant's only solace is that it will be entitled to a fourth priority claim against the estate for contributions to an employee benefit plan pursuant to Section 507(a)(4)." *Id.* at 96. While an endorsement for priority treatment of Zurich's claim, it is mere dicta.

As Zurich mentioned in its memorandum in support of priority status for its claim, the most recent court to consider the matter held that workers' compensation insurance premiums are entitled to priority treatment under § 507(a)(4). *In re Integrated Health Services, Inc.*, 291 B.R. 611 (Bankr. D. Del. 2003). In *Integrated Health* the bankruptcy court found sufficient clarity in the plain meaning of the Code to afford priority treatment. Even after an (unnecessary) inquiry into the legislative history, and even while admitting that § 507(a)(4)'s genesis was Congress's "response to the decision in *United States v. Embassy Restaurant* (*id.* at 615),

the court concluded there to be no "logical basis for excluding workers' compensation insurance premiums from section 507(a)(4)." *Id.* at 613. This Court disagrees.

First, from a reading of *Embassy Restaurant* it is perfectly clear that the Supreme Court was dealing exclusively with the issue of whether the Code's priority claim section[6] for "wages . . . due to workmen" included employer contributions to a labor union welfare fund to maintain "'life insurance, weekly sick benefits, hospital and surgical benefits' acid other advantages for members of the locals" *Embassy Restaurant*, 369 U.S. at 30. The nature of the contributions as "bargained for" was the very heart of the issue. In fact, the first sentence of the opinion reads in part: "The sole issue involved here is whether contributions by an employer to a welfare fund *which are required by a collective bargaining agreement* are entitled, in bankruptcy, to priority. . . ." *Id.* at 29 (emphasis added). An amendment to the Bankruptcy Code enacted to overrule *Embassy Restaurant* necessarily addresses the same issue as the case. Second, Judge Walrath points out in *Integrated Health* that Congress did not specifically exclude workers' compensation insurance premiums from the scope of § 507(a)(4). But for this conclusion she admittedly quotes an excerpt from congressional reports made after the reports "*referenc[e] labor contract negotiations*" *Integrated Health*, 291 B.R. at 614 (discussing H.R. Conf. Rep. No. 95-595 at 357-58 (1977); S. Conf. Rep. No. 95-989, at 67-73 (1978).). This Court disagrees with the conclusion reached in *Integrated Health* that nothing in the language of the Code nor its history indicates that § 507(a)(4) excludes workers' compensation premiums.

6. 11 U.S.C. § 104, in 1959.

Appendix C

Conclusion

Congress intended § 507(a)(4) to overrule *Embassy Restaurant* and, as can be determined from the its history, intended the section's priority treatment to be tied to bargained for, wage-substitution-type benefits. A debtor's unpaid workers' compensation insurance premiums are not afforded priority treatment. While these premiums are unarguably a benefit for employees, they are required by statute and are thus not considered "an employee benefit plan" under the Bankruptcy Code.

As such, it is **ORDERED** that Zurich's proof of claim for unpaid workers' compensation insurance premiums be **MODIFIED** from an unsecured *priority* claim to an unsecured *non priority* claim.

The Clerk is directed to transmit copies of this Order to the parties in interest.

ENTER: 7/15/03

s/ [illegible]
U.S. Bankruptcy Judge

No. 05-128

Supreme Court, U.S.
FILED
OCT 6 - 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HOWARD DELIVERY SERVICE, INC., Debtor, and the OFFICIAL COMMITTEE of UNSECURED CREDITORS of HOWARD DELIVERY SERVICE, INC.,

Petitioners,

v.

ZURICH AMERICAN INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONSE

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CORPORATE DISCLOSURE STATEMENT

The respondent is Zurich American Insurance Company. Its parent corporations are Zurich Holding Company of America, Inc., Zurich Insurance Company, Crown Management Services Limited, Zurich Group Holding, Zurich Financial Services, and Allied Zurich p.l.c.

No publicly held company owns 10% or more of respondent's stock.

RESPONSE TO PETITION FOR *CERTIORARI*

Zurich does not oppose *certiorari*.

Respondent Zurich American Insurance Company acknowledges that the Fourth Circuit's decision in this case has contributed to a widening split of authority among the Circuit Courts of Appeals on the question whether prepetition claims for unpaid workers' compensation insurance premiums are entitled to priority under former section 507(a)(4) of the Bankruptcy Code, now codified at 11 U.S.C. § 507(a)(5) (2005). Because of the importance of the question presented, Zurich agrees that, absent Congressional intervention, the issue should be resolved by this Court. Although Congress recently overhauled the Bankruptcy Code, it did not address this issue. Hence, Zurich has determined not to oppose *certiorari*.

If the Court grants *certiorari*, we will argue that it should affirm the Fourth Circuit's decision because, as Judge King found in his concurring opinion, the applicable statutory term—"contributions to an employee benefit plan arising from services rendered"—is unambiguous, and includes premiums for workers' compensation insurance. *In re Howard Delivery Service, Inc.*, 403 F.3d 228, 238 (King, J., concurring). Hence, there is no need to resort to legislative history or other rules of construction. *Id.* at n.14; *see also Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 1030 (2004) (where statutory term is unambiguous, no need to consult legislative history). But even if the legislative history or other rules of construction are consulted, as Judge Shedd determined in his separate concurring opinion, the result should be the same: priority accorded the claim here. *In re Howard Delivery Service, Inc.*, 403 F.3d at 241 (Shedd, J., concurring).

Respectfully submitted,

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Joint Appendix Unavailable for Filming at this Time

(4)

No. 05-128

DEC 22 2005

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HOWARD DELIVERY SERVICE, INC., *et al.*,

Petitioners,

v.

ZURICH AMERICAN INSURANCE CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE
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QUESTION PRESENTED FOR REVIEW

In a bankruptcy case, is an unsecured claim for unpaid premiums owing for a debtor's statutory workers' compensation liability insurance policy entitled to priority under Section 507(a)(4) of the Bankruptcy Code as a "contribution to an employee benefit plan arising from services rendered", as held by the Fourth and Ninth Circuits, or is such a claim not entitled to Section 507(a)(4) priority, as held by the Sixth, Eighth and Tenth Circuits?

LIST OF PARTIES AND 29.6 STATEMENT

The following is a complete list of all parties with an interest in the outcome of this litigation.

Petitioners herein:

Howard Delivery Service, Inc.

Official Committee of Unsecured Creditors of Howard Delivery Service, Inc.

Neither petitioner has a parent company and no publicly held company owns 10% or more of the stock of either petitioner.

Respondent herein:

Zurich American Insurance Company

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OPINIONS BELOW

The ruling below of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit") is reported as *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (In re Howard Delivery Serv., Inc.)*, 403 F.3d 228 (4th Cir. 2005) (per curiam), and is printed at Pet. App. 1a.

That decision reversed and remanded an unpublished Memorandum Opinion and Order entered by the United States District Court for the Northern District of West Virginia (the "District Court"), *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (In re Howard Delivery Serv., Inc.)*, No. 3:03CV61, (N.D.W. Va. Dec. 22, 2003, as entered Dec. 23, 2003). It is available in electronic form at 2003 U.S. Dist. LEXIS 26464, and is printed at Pet. App. 39a.

The decision of the United States District Court for the Northern District of West Virginia affirmed an unpublished Memorandum Opinion of the United States Bankruptcy Court for the Northern District of West Virginia (the "Bankruptcy Court"), *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (In re Howard Delivery Serv., Inc.)*, BK No. 02-30289, (Bankr. N.D.W. Va. July 15, 2003), which is available in electronic form at 2003 Bankr. LEXIS 2142, and is printed at Pet. App. 51a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

This case involves the interpretation of § 507(a)(4) of the Bankruptcy Code, 11 U.S.C. § 507(a)(4),[1] which provides as follows:

§ 507. Priorities

(a) The following expenses and claims have priority in the following order:

* * *

(4) Fourth, allowed unsecured claims for contributions to an employee benefit plan –

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of –

(i) the number of employees covered by each such plan multiplied by $4,650;[2] less

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1. Effective April 20, 2005, § 507(a)(4) of the Bankruptcy Code was renumbered as § (a)(5) under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Pub. L. No. 109-8, § 212 (2005). All citations to the Bankruptcy Code refer to the Code as it existed when the Fourth Circuit's decision was entered.

2. The dollar amount was amended to $2,400 in 1978 and has been raised several times pursuant to § 104(b)(1) of the Bankruptcy (Cont'd)

> (ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

STATEMENT OF THE CASE

A. Statement of the Facts

The relevant facts in this case are not in dispute. For many years, Petitioner Howard Delivery Service, Inc. ("Howard") owned and operated a freight carrier business that serviced the Midatlantic and Midwest regions. Pet. App. 3a.

Howard was subject to the workers' compensation statutes in the various states in which it did business, including West Virginia, where its principal place of business was located. These statutes establish a comprehensive system of mandatory workers' compensation. *Id.* For example, pursuant to the West Virginia statute, W. VA. CODE § 23-1-1 to -19 (1988), Howard was required to fund payment of workers' compensation benefits either by subscribing to the State's Workers' Compensation Fund (the "Fund") or obtaining from the West Virginia State Compensation Commissioner authority to opt out of the Fund and become

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(Cont'd)

Code, 11 U.S.C. § 104(b)(1). It is now set at $10,000. The dollar amount was $4,650 when Petitioner Zurich American Insurance Company sought priority treatment of its claim from the Bankruptcy Court.

a self-insurer. All claims by employees are filed with and processed by the Fund, including claims by employees of self-insurers that have opted out of the Fund. *Id.*

To comply with these statutory requirements, Howard entered into an agreement with Respondent Zurich American Insurance Co. ("Zurich") in 1997 to provide Howard's workers' compensation insurance coverage, together with other forms of liability coverage. *Id.* These policies took effect on July 1, 1997 and remained in effect until January 22, 2002, when they were canceled. *Id.* Under the terms of the 1997 agreement, Howard was required to reimburse Zurich for all losses under the workers' compensation policies up to $250,000. *Id.* at 4a n2.

B. Procedural History

Howard filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code on January 30, 2002. *Id.* at 4a. On May 9, 2002, Zurich filed two proofs of claim in the bankruptcy case, each of which was for insurance premiums in an unliquidated amount. JA 32a, 33a. Proof of Claim No. 120 asserted priority status as an "administrative expense – insurance premiums" pursuant to 11 U.S.C. § 507(a)(2) or (a)(5), not as contributions to an employee benefit plan pursuant to 11 U.S.C. § 507(a)(4). JA 32a. Proof of Claim No. 121 was an unsecured nonpriority claim and is not relevant.

On or about March 17, 2003, Howard filed Debtor's Request for Estimation of Unliquidated Claims of Zurich American Insurance Company, requesting that the bankruptcy court estimate the unliquidated claims set forth in Proofs of Claim Nos. 120 and 121. JA 25a. On March 28, 2003, Zurich amended its claims by filing Amended Proofs of Claim Nos. 306 and 307. Claim No. 306 amended Claim No. 120

in two relevant respects: it changed the claim amount from unliquidated to $410,215.00, and it changed the basis for claiming priority treatment to § 507(a)(4), relating to contributions to an employee benefit plan. JA 34a. Proof of Claim No. 307 amended Claim No. 121 and is not relevant.

On June 12, 2003, Howard filed a written objection to Proof of Claim No. 306, arguing that the claim was not entitled to priority under § 507(a)(4) because the unpaid insurance premiums upon which the claim was based did not constitute "contributions to an employee benefit plan." JA 21a. Howard also objected to the amount of the claim. *Id.* The Bankruptcy Court entered a memorandum opinion on July 15, 2003, holding that Zurich's claim was not entitled to priority under § 507(a)(4), and therefore upheld Howard's objection to the claim. *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (In re Howard Delivery Serv., Inc.)*, BK No. 02-30289, 2003 Bankr. LEXIS 2142 (Bankr. N.D.W. Va. 2003); Pet. App. 51a. The court ordered that Zurich's proof of claim be modified from an unsecured priority claim to an unsecured non-priority claim. Pet. App. 57a.

On appeal, the District Court agreed with the Bankruptcy Court that the unpaid insurance premiums due Zurich were not "contribution to an employee benefits plan" and thus not entitled to priority under § 507(a)(4), and entered a memorandum opinion and order affirming the Bankruptcy Court's decision. *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (In re Howard Delivery Serv., Inc.)*, No. 3:03CV61, 2003 U.S Dist. LEXIS 26464 (N.D.W. Va. 2003, Dec. 22, 2003, as entered Dec. 23, 2003); Pet. App. 39a. Zurich thereafter took an appeal to the Fourth Circuit.

On March 24, 2005, the Fourth Circuit reversed the District Court's decision by a fractured per curiam ruling. *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (In re*

Howard Delivery Serv., Inc.), 403 F.3d 228 (4th Cir. 2005); Pet. App. 1a. There was no majority or plurality opinion of the court.

Judge King wrote an opinion concurring in the judgment in which he found that the language of § 507(a)(4) is plain and unambiguous and that the unpaid premiums constituted "contributions to an employee benefits plan arising from services rendered." 403 F.3d at 232, Pet. App. 8a. By contrast, Judge Shedd, in his concurring opinion, found the language of § 507(a)(4) to be ambiguous. 403 F.3d at 239, Pet. App. 23a. Nevertheless, Judge Shedd ultimately agreed with Judge King that Zurich's claim was entitled to priority, but relied instead upon a provision of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.S. § 1001-1461, that referred to the term "employee benefit plan." *Id.*

Judge Niemeyer issued a dissenting opinion in which he found that:

> [t]he plain language of § 507(a)(4), which gives priority to claims for unpaid "contributions to an employee benefit plan arising from services rendered," does not cover claims for unpaid insurance premiums charged to cover the statutory liability of the employer to its employees. The unpaid insurance premium is not an unpaid *contribution*; it is not an unpaid contribution *to an employee benefit plan*; and it does not arise out of an employee's *services rendered* in that it is not a *wage surrogate*.

403 F.3d at 244, Pet. App. 35a (emphasis in original). Judge Niemeyer further found that the opinions of Judge King and Judge Shedd violated the underlying rule that priorities under the Bankruptcy Code are to be narrowly construed. 403 F.3d at 244, Pet. App. 36a. (Niemeyer, J., dissenting).

On November 7, 2005, this Court granted Howard's and the Official Committee of Unsecured Creditors of Howard Delivery Service, Inc.'s ("Committee") Petition for Writ of Certiorari challenging the Fourth Circuit's holding.

SUMMARY OF ARGUMENT

A fundamental principle underlying the Bankruptcy Code is that creditors should generally be treated equally. *Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 227 (1930). If the claims of certain creditors are to be given priority over the claims of other creditors, that priority must be authorized by Congress in clear and precise terms. *Nathanson v. NLRB*, 344 U.S. 25, 29 (1952) (Jackson & Black, J.J., dissenting).

The language of § 507(a)(4) of the Bankruptcy Code specifically limits priority treatment to "contributions to an employee benefit plan arising from services rendered." Applying the plain meaning of these words, premiums due under a workers' compensation liability insurance policy are not entitled to priority treatment.

First, the premiums are not "contributions" under the plain definition of this term. The premiums do not constitute voluntary or negotiated "contributions" by an employer, but instead are required payments made to discharge a statutorily mandated liability.

Second, workers' compensation insurance coverage is not an "employee benefit plan." The term "employee benefit plan" is not defined in the Bankruptcy Code, and it is not appropriate to look to ERISA for such a definition. The various definitions contained in ERISA were specifically designed to effectuate the purposes of ERISA, not the Bankruptcy Code. There is no reason to believe that when Congress used the words "employee benefit plan" in the

Bankruptcy Code, it intended to incorporate the ERISA definition of these words into the Bankruptcy Code.

Unlike pension plans or life, health or disability insurance plans, workers' compensation insurance is a legally mandated, non-negotiated form of risk allocation. Rather than serving as a wage substitute, it is a statutory obligation that employers must meet, regardless of the wages or other fringe benefits that they provide their employees. The coverage is not something that can be bargained for in lieu of higher wages or other benefits; it is provided by statute, and employees are subject to workers' compensation coverage whether or not the insurance premiums are paid. It is the employer, rather than the employee, that is the principal beneficiary of a workers' compensation insurance policy.

Third, the claim for unpaid premiums does not "arise from services rendered." It arises instead from the employer's default in payment to the insurance company, not from services rendered by the employees.

Even if § 507(a)(4) is deemed ambiguous, making it necessary to look to the Congressional intent behind the provision, the legislative history makes clear that premiums paid for a workers' compensation insurance policy are not contributions to an employee benefit plan, since workers' compensation insurance is a statutorily mandated system of risk allocation and not a wage substitute.

Congress enacted § 507(a)(4) specifically to overrule the holdings of two Supreme Court cases that had limited the existing wage priority and did not recognize various wage substitutes or fringe benefits that are often bargained for in lieu of wages. *See United States v. Embassy Rest., Inc.*, 359 U.S 29 (1959); *Joint Indus. Bd. v. United States*, 391 U.S. 224 (1968). Section 507(a)(4) was intended to give priority

status to claims for such fringe benefits, and there is nothing in the legislative history to suggest that § 507(a)(4) was intended to extend priority treatment beyond such fringe benefits. *See, e.g., State Ins. Fund v. Southern Star Foods, Inc.* (*In re Southern Star Foods, Inc.*), 144 F.3d 712, 716 (10th Cir. 1998), *cert. denied*, 525 U.S. 978 (1998).

The Sixth, Eighth and Tenth Circuits have all held, consistent with the dissenting opinion of Judge Niemeyer in the decision below, that premiums due under a workers' compensation insurance policy are not contributions to an employee benefit plan. The concurring opinions of Judges King and Shedd and the decision of the Ninth Circuit in *Employers Ins. of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605 (9th Cir. 1993), do not withstand scrutiny in light of the reasoning relied upon by these other Circuit Courts. Accordingly, the Court should reverse the Court of Appeals and hold that the claims of Zurich are not entitled to priority treatment under § 507(a)(4) of the Bankruptcy Code.

ARGUMENT

Section 507(a)(4) of the Bankruptcy Code grants a fourth priority to claims for "contributions to an employee benefit plan – arising from services rendered within 180 days before the date of the filing of the petition[.]" 11 U.S.C. § 507(a)(4). The only issue in this case is whether Zurich's claim for unpaid premiums due under the workers' compensation insurance policy issued to Howard is entitled to such priority. Both the plain language of § 507(a)(4) and its legislative history demonstrate that Zurich's claim is not entitled to priority, and that granting Zurich's claim priority treatment impermissibly broadens the scope of § 507(a)(4) in derogation of the fundamental principles underlying the Bankruptcy Code.

I. Under the Plain Meaning of § 507(a)(4) of the Bankruptcy Code, a Claim for Premiums Due Under a Workers' Compensation Insurance Policy Is Not Entitled to Priority Treatment.

As in all cases involving statutory construction, the "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (finding that the term "employee" in Title VII is ambiguous in its context). To determine if the language is plain, the court "must consider the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341. If the statutory language is clear and unambiguous, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

At issue in this case are the terms "contribution," "employee benefit plan," and "arising from services rendered." None of these terms are defined in the Bankruptcy Code, nor has this Court had a prior occasion to construe them. In determining their meaning in § 507(a)(4), the Court must consider the specific language itself, the context of that language, and the broader context of the statute as a whole. *Robinson*, 519 U.S. at 341. The broader context of the statute is of particular importance here.

> [I]n construing provisions of the Bankruptcy Code, we keep in mind its overriding objective of providing to creditors equal distribution of a debtor's limited resources. *See Isaac v. Temex Energy, Inc. (In re Amarex, Inc.)*, 853 F.2d 1526, 1530 (10th Cir. 1988). Because of this broad equitable purpose, statutory priorities must be

> narrowly construed. *See Travelers Prop. Cas. Corp.*, 224 F.3d at 517; *New Neighborhoods, Inc. v. West Virginia Workers' Comp. Fund*, 886 F.2d 714, 719 (4th Cir. 1989); *Isaac*, 853 F.2d at 1530.

Howard Delivery, 403 F.3d at 242 (per curiam) (Niemeyer, J., dissenting); Pet. App. 30a.

A class of creditors may receive preferential treatment only through clear authorization from Congress. *See United States v. Embassy Rest., Inc.* 359 U.S. 29, 31 (1959). Accordingly, if a particular type of claim is not identified clearly and unequivocally in the priority provisions of the Bankruptcy Code, it must be that "Congress had no intention of giving the claim priority." *See Nathanson*, 344 U.S. at 29; *Employee Transfer Corp. v. Grigsby (In re White Motor Corp.)*, 831 F.2d 106, 110 (6th Cir. 1987). It is for Congress, not the courts, to create a new priority. *See Caminetti*, 242 U.S. at 485.

The Fourth Circuit's opinion cannot be reconciled with these principles.

1. The insurance premiums are not "contributions."

In his concurring opinion, Judge King draws upon the 1981 edition of Webster's Third New International Dictionary to find that the definition of "contribution" is broad enough to encompass statutorily mandated insurance premium payments. *Howard Delivery*, 403 F.3d at 235; Pet. App. 14a. Yet, looking to an earlier version of same source – the 1976 edition of the dictionary that was in existence when § 507(a)(4) was enacted – the Bankruptcy Court in *Employers Ins. of Wausau, Inc. v. HLM Corp. (In re HLM Corp.)*, 165 B.R. 38 (Bankr. Minn. 1994), *aff'd* 183 B.R. 852 (D. Minn.

1994), *aff'd* 62 F.3d 224 (8th Cir. 1995), reached the opposite conclusion. According to the 1976 edition of Webster's Third International Dictionary, the verb "contribute" is defined as "to give or to grant in common with others (as to a common funds or to a common purpose): give (money or other aid) for a specified object." As the court noted,

> [t]his definition implies some sort of voluntary act. Typically, fringe benefits such as health, life and disability insurance are voluntarily given. Yet the payment of workers' compensation insurance premiums is not "voluntary." Rather, it is statutorily mandated.

Id. at 40.[3]

Preferring Random House to Webster's, the Sixth Circuit, in *Travelers Property Casualty Corp. v. Birmingham-Nashville Express, Inc. (In re Birmingham-Nashville Express, Inc.)*, 224 F.3d 511 (6th Cir. 2000), reached the same conclusion as the bankruptcy court in *HLM Corp.* that workers' compensation insurance premiums were not "contributions." However, the Sixth Circuit based its decision on the fact that the term at issue connotes a shared, rather than unilateral, act. According to *The Random House Dictionary Of The English Language* 318 (1981), the word "contribute" generally describes the giving of something

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3. *Accord Travelers Prop. Cas. Corp. v. Birmingham Nashville Express, Inc. (In re Birmingham-Nashville Express, Inc.)*, 224 F.3d 511, 513 (6th Cir. 2000) ("The word 'contribution' generally connotes an optional choice such as an employer's decision to provide fringe benefits like health, life or disability insurance."); *In re Allentown Moving & Storage, Inc.*, 208 B.R. 835, 837 (Bankr. E.D. Pa. 1997), *aff'd* 214 B.R. 761 (E.D. Pa. 1997) ("Simply put, since workers' compensation benefits are a statutory requirement not obtained through collective bargaining, they cannot be considered a 'contribution' to an employee benefit plan.").

"*along with others* to a common, supply, fund, etc." Thus, the Court concluded that "the term 'contribution' does not describe a unilateral purchase of some product or service." *Id.* at 515 (emphasis added).

The majority of circuit courts that have considered this issue thus have concluded that premiums paid for state-mandated workers' compensation liability insurance are not "contributions" as that term is used in § 507(a)(4) of the Bankruptcy Court. *See HLM Corp.*, 62 F.3d at 227 (holding that unpaid pre-petition premiums under Minnesota's workers' compensation statute do not constitute "contributions to an employee benefit plan"); *State Ins. Fund v. Southern Star Foods, Inc.*, 144 F.3d 712, 717 (10th Cir. 1998), *cert. denied*, 525 U.S. 978 (1998). (holding that premiums for workers' compensation insurance are not contributions to an employee benefit plan as contemplated by Congress in the enactment of § 507(a)(4)); *Birmingham-Nashville Express*, 224 F.3d at 515 (finding that employees could not have made a contribution where workers' compensation premiums were paid in full by the employer as required by state law). *But see In re Saco Local Dev. Corp.*, 711 F.2d 441 (1st Cir. 1983) (finding that premiums owed to the insurer constituted contributions under § 507(a)(4)). At best, the contrary holding of Judge King[4] suggests that the term "contribution" may be ambiguous, thus compelling a review of the legislative history of § 507(a)(4), as discussed in section II below.[5]

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4. Neither Judge Shedd nor Judge Niemeyer specifically address the proper interpretation of the term "contribution."

5. *See, e.g., State Ins. Fund v. Southern Star Foods, Inc. (In re Southern Star Foods, Inc.)*, 144 F.3d 712, 715 (10th Cir. 1998), *cert.* (Cont'd)

2. A workers' compensation insurance policy is not an "employee benefit plan."

The two concurring opinions of the Fourth Circuit panel found that the workers' compensation liability insurance policy provided by Zurich in accordance with the requirements of West Virginia law fell within the definition of an "employee benefit plan." Yet, there was no agreement between the concurrences as to why that is so.

Judge King looked to the dictionary definitions of the individual words "benefit" and "plan," and he concluded the phrase was unambiguous. *Howard Delivery*, 403 F.3d at 235; Pet. App. 16a-17a. According to *Webster's Third International Dictionary* (1976), a "plan" is a "detailed and systematic formulation of a large-scale . . . program of action," and a "benefit" is a "cash payment provided for under an . . . insurance plan" or "financial help in time of sickness, old age, or unemployment." 403 F.3d at 236, Pet. App. 16a-17a. Yet, these certainly are not the only definitions of these words and Judge King failed to consider whether "Congress could have intended the phrase 'employee benefit plan' to be a term of art having a specific meaning different from the sum of what these three words mean individually." 403 F.3d at 239, Pet. App. 24a. (Shedd, J., concurring). Moreover, Judge King did not consider whether the plain meaning he attributed to the individual words in § 507(a)(4) was consistent with their usage within the broader context of the Bankruptcy Code. An approach that relies solely on generic dictionary definitions of words like "plan" and "benefit" ignores the specific content in which the words are used and, in the specific context of § 507(a)(4), fails to factor in the principle that bankruptcy priorities must be narrowly construed.

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denied, 525 U.S. 978 (1998) ("The split in the circuits is, in itself, evidence of the ambiguity of the phrase 'contributions to an employee benefit plan.'").

Judge Shedd recognized the defect in this approach, noting that "Judge King picks and chooses from accepted dictionary definitions" and that, while the results of such an approach "might be one reasonable interpretation of these words, it is not the *only* reasonable interpretation." *Id.* (Shedd, J., concurring).

Contrary to the opinion of Judge King, Judge Shedd found the phrase "employee benefit plan" to be ambiguous and thus looked to the legislative history for guidance. *Id.* (Shedd, J., concurring). However, Judge Shedd reached the erroneous conclusion that the language was controlled by the provisions of ERISA, which contains its own definition of "employee benefit plan."[6] Notably, it is Judge King who points out the flaw of this approach:

> Importantly, the Supreme Court has held that, for purposes of construing terms found in the Bankruptcy Code, it is inappropriate to incorporate characterizations of a term in another statute absent some congressional indication that this was intended. *United States v. Reorganized CF&I Fabricators, Inc.*, 518 U.S. 213, 225 (1996).

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6. Judge Shedd based his conclusion primarily on the fact that one witness who testified at the hearings on proposed § 507(a)(4) suggested that the wording of the provision should parallel the language of ERISA so that priority would be granted to "any contributions to an employee benefit plan as defined in ERISA § 3(3)." 403 F.3d at 240, Pet. App. 25a. The fundamental flaw in this argument is that the final language of § 507(a)(4) does not include the phrase "as defined in ERISA § 3(3)" although Congress could easily have included this phrase if it had intended for the ERISA definition to apply to § 507(a)(4). Additionally, neither the Senate Report nor the House Report contains any indication that the suggestion made by this one witness who testified a full two years earlier was considered, let alone adopted.

> I therefore decline to rely upon the ERISA definition.

Id. at 235 n.4; Pet. App. 15a n.9.

That very admonition was given with respect to the interpretation of bankruptcy priorities by this Court in *Embassy Restaurant, Inc.*, 359 U.S. 29, 33 (1959). There, the Court expressly rejected the argument that fringe benefits should be deemed to be "wages" because they were found to be within the definition of wages under the National Labor Relations Act, 29 U.S.C.A. § 151, and the Social Security Act, 42 U.S.C.A. § 301: "We construe the priority section of the Bankruptcy Act, not those statutes." *Id.* Consistent with this Court's reasoning in *Embassy Restaurant*, the Sixth Circuit, in *Birmingham-Nashville Express*, held that incorporation of ERISA into the Bankruptcy Code was "ill-advised" since "[t]hose two pieces of legislation serve different and non-overlapping purposes." 224 F.3d at 517. Likewise, the Tenth Circuit in *Southern Star Foods* declined to read the ERISA definition of "employee benefit plan" into the Bankruptcy Code, noting that "[t]he ERISA definition and associated court guidelines were designed to effectuate the purpose of ERISA, not the Bankruptcy Code" and that "broadening the Bankruptcy Code by incorporating the ERISA definition into the § 507(a)(4) priority determination would be contrary to the tenet that priorities are to be narrowly construed." 144 F.3d at 714.

Moreover, Congress has demonstrated that when it intends to incorporate provisions of ERISA into the Bankruptcy Code, it does so in express terms. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, enacted on April 20, 2005, contains examples of this. Section 704(a)(11) now addresses the responsibilities of a Chapter 7 trustee when the debtor had maintained an employee benefit plan prior to filing for

bankruptcy. The amended provision provides that "[t]he trustee shall – (ii) if, at the time of the commencement of the case, the debtor (or any entity designated by the debtor) served *as the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan*, continue to perform the obligations required of the administrator." Pub. L. No. 109-8, § 446 (2005) (emphasis added). A parallel provision was added to § 1106(a)(1) of the Bankruptcy Code. *Id.*

By contrast, § 724(f) of the Bankruptcy Code, Pub. L. No. 109-8 § 701 (2005), was amended by BAPCPA to exempt "claims for contributions to an employee benefit plan" from certain tax liens, but Congress did not incorporate the definitions contained in ERISA, as it did in §§ 704(a)(11) and 1106(a)(1). Moreover, Congress did not amend § 507(a)(4) as part of BAPCPA to incorporate ERISA into the definition of "employee benefit plan," although it easily could have done so if it wished to overrule the decisions reached by the Sixth, Eighth and Tenth Circuits on the meaning of this term.[7]

Furthermore, the words "employee benefit plan" must be interpreted in light of the broader context in which § 507(a)(4) of the Bankruptcy Code is used and consistent with the overriding principle of bankruptcy law that claim priorities are to be narrowly construed. *Joint Indus. Bd. v. United States*, 391 U.S. 224, 228 (1968). Adhering to these principles, Judge Niemeyer, in his dissenting opinion, correctly concluded that the plain meaning of "employee benefit plan" did not include a workers' compensation insurance policy.

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7. *See Joint Indus. Bd. v. United States*, 391 U.S. 224, 228 (1968) (finding failure of Congress to amend priority provisions of Bankruptcy Code was an indication that Congress did not intend to overrule prior court interpretations).

Workers' compensation insurance is liability or indemnity insurance that is statutorily mandated to cover the liability of an employer for workplace injuries. As with other state workers' compensation statutes, the West Virginia Workers' Compensation Act "was designed to remove negligently caused industrial accidents from the common law tort system." *Belcher v. J.H. Fletcher & Co.*, 498 F. Supp. 629, 630-31 (S.D.W. Va. 1980) (citing *Mandolis v. Elkins Indus., Inc.*, 246 S.E.2d 907 (W. Va. 1978)). Rather than constituting a "plan" for providing "employee benefits," it is "a statutorily mandated system to spread the risks of work-related injuries." *Employers Ins. of Wausau, Inc. v. HLM Corp. (In re HLM Corp.)*, 165 B.R. 38, 40 (Bankr. Minn. 1994), *aff'd* 183 B.R. 852 (D. Minn. 1994), *aff'd* 62 F.3d 224 (8th Cir. 1995). An employer does not buy workers' compensation insurance to benefit its employees; it buys it to comply with the law and to protect itself against employee claims. In exchange, the legislature abrogates the employee's right to pursue common law tort claims for workplace injuries.[8] It is "no different than motor vehicle liability insurance that many states require drivers to carry. This is clearly an insurance scheme. It is not a plan." *Id.* at 41. Indeed,

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8. As the Bankruptcy Court in *In re HLM Corp.* explained,

> Generally, workers' compensation laws mandate that, unless an employer is specifically exempted, an employer is statutorily liable to compensate an employee for any work-related injury. This is generally a condition of exercising the privilege of transacting business in that state. In return, the employee accepting the benefits is deemed to have waived his or her common-law rights to recover from the employer whose negligence may have contributed to the injury.

Id. at 41 n.4 (citing Spencer LeRoy et al., *Workers' Compensation in Bankruptcy: How do the Parties Fare?* 24 TORT & INS. L.J. 593 (1989)).

it is no different than any policy of liability insurance — directors and officers liability insurance, fire and theft insurance, general liability insurance — that protect the employer against claims that may be brought against it by its employees.[9]

Congress has clearly demonstrated that it recognizes the distinction between workers' compensation benefits and wages and fringe benefits. As this Court observed in *Embassy Restaurant*, Congress specifically dealt with workers' compensation claims in bankruptcy when it amended the Bankruptcy Act in 1934 to allow workers' compensation claims as provable debts. At that time, it granted workers' compensation claims a level seven priority, separate and distinct from the then level four priority accorded wages. 359 U.S. at 556. In 1938, Congress completely abolished all priority treatment for workers' compensation claims. *Id.*

Two conclusions can be drawn from these legislative acts. First, when Congress wanted to address the effect of bankruptcy on workers' compensation claims, it had no difficulty expressing itself in clear and precise terms. When it wanted workers' compensation claims to have priority in bankruptcy, it expressly provided that such claims would have level seven priority. Second, Congress did not (at least during 1934-1938) view workers' compensation claims to be entitled to the same priority as wage claims. In 1938, it was of the view that workers' compensation claims should receive no priority. At no time since 1938 has Congress in any definitive fashion indicated that claims relating to workers' compensation should receive any manner of priority.

9. That these other types of insurance protect the employer against the claims of third parties as well as those of employees is of no consequence. Under Judge King's unduly broad reading of the statute, any insurance policy that inures to the benefit of employees arguably would fall within the definition of an "employee benefit plan."

Moreover, the passage and subsequent repeal of priority status for workers' compensation claims demonstrates that Congress recognized a distinction between workers' compensation benefits and other forms of employee compensation.

There are several significant distinctions between workers' compensation insurance policies and the various health, welfare and pension plans that have been found to fall within the definition of "employee benefit plan." Of particular significance is the fact that, unlike workers' compensation coverage, these other plans are entirely voluntary and only available (at least at the employer's expense) if the employer so chooses. If the employer chooses not to provide its employees with these fringe benefits, it suffers no consequence and the employee receives no benefit. By contrast, if the employer fails to maintain an adequate workers' compensation liability insurance policy, it is subject to various statutory penalties, *but* the employee still receives his full benefits from the state's workers' compensation fund. Thus, the employee is ultimately in the same position with or without the workers' compensation insurance policy, and it is the employer that benefits most directly from the existence of the policy.

The bankruptcy court in *In re HLM Corp.* recognized this distinction in its review of the Minnesota workers' compensation statute, which mirrors the West Virginia statute. 165 B.R. at 41. The court observed that with employee benefit plans, such as employer-sponsored health care, the employee is the insured party and thus is the one who benefits and who suffers if the plan payments are not made.

> By contrast, workers' compensation insurance insures the *employer* from its liability to provide workers' compensation benefits. The fact that the employer is uninsured does not leave the employee without workers' compensation

> coverage, for the employee will still receive benefits from a special compensation fund. See Minn. Stat. § 176.183 subd. 1 (1992). The employee may also have additional remedies against the employer. See Minn. Stat. § 176.181 subd. 3 (1992); *Rezac v. Maier (In re Maier)*, 38 B.R. 231, 234 (Bankr. D. Minn. 1984). Accordingly, the payment of workers' compensation premiums to the insurer does not "benefit" the employee, but rather "benefits" the employer.

HLM Corp. at 41 (emphasis added). By the same token, employees cannot bargain with their employer for or against these workers' compensation benefits. They are fixed by statute. In contrast, health, welfare and pension benefits can be, and typically are, the subject of negotiation between employee and employer as part of a bargained-for compensation package that includes both wages and non-wage fringe benefits.

As some courts have noted, the fringe benefits need not be the result of wage concessions made in the arena of collective bargaining in order to fall within the scope of § 507(a)(4). In *In re Saco Local Dev. Corp.*, 711 F.2d 441 (1st Cir. 1983), the First Circuit was faced with the issue of whether unpaid premiums for employee group life, health and disability insurance were entitled to priority treatment under § 507(a)(4). The employees of the debtor in *Saco* were not unionized, so the health benefits in question were not the product of collective bargaining. However, there was testimony in the record that the health plan was the result of a *de facto* "bargain" in which employees accepted lower wages in return for a health plan that was funded solely by the debtor employer. *Id.* at 448. The trustee for the debtor argued that § 507(a)(4) was limited to employee benefit plans that the employer was contractually obligated to provide, such as those contained in collective bargaining agreements. The trustee further argued that the priority was not available to insurers, but only to employees or their fiduciaries.

Speaking for the court, then-Judge Breyer rejected each of the trustee's arguments. First, he found nothing in the legislative history of § 507(a)(4) to suggest that Congress intended the priority to be available only to those employee benefit plans that were the result of collective bargaining agreements, noting that "insurance is no less a fringe benefit because it is granted by an employer 'unilaterally' rather than being provided under the terms of a collective bargaining agreement." *Id.* at 449.[10] Second, the court found that the insurance company providing the health coverage was within the scope of § 507(a)(4) to the same extent as the employee or the employee's representative, reasoning that "to allow the insurer to obtain its premiums through the priority would seem the surest way to provide the employees with the policy benefits to which they are entitled." *Id.*

The holding in *Saco* is in no way inconsistent with the holdings of the Sixth, Eighth and Tenth Circuits on the issue of unpaid workers' compensation insurance premiums. *See, e.g., Southern Star Foods*, 144 F.3d at 716-717. First, *Saco* did not involve workers' compensation insurance and, consequently, the court did not have occasion to consider the various important distinctions between workers' compensation liability insurance required by statute and group life, health and disability insurance offered as an inducement to employment. Second, the court extended § 507(a)(4) priority treatment to the insurance companies issuing the group health, life and disability policies based on the rationale that such priority treatment is the surest way to provide the employees themselves with the benefits to which they are entitled. This rationale does not apply in the case of workers' compensation insurance. As courts dealing

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10. Judge Breyer did note, however, that the benefit was the result of a *de facto* bargain in that the debtor used the insurance plan to attract employees and was able to offer lower wages in exchange for the benefits provided under the health plan.

specifically with workers' compensation insurance have duly noted, the employee receives the same benefit whether or not the premiums are paid. *See, e.g., In re HLM Corp.*, 62 F.3d at 226. Thus, extending priority treatment under § 507(a)(4) to insurance companies merely puts the insurance companies in a better position *vis-à-vis* other creditors; it does not protect the employees of the debtor as the statute intended.[11]

The inherent distinction between workers' compensation insurance coverage and wage substitutes such as life insurance, health insurance and pension benefits, is further reinforced by the context in which § 507(a)(4) appears within the priority scheme of the Bankruptcy Code. Rather than existing in isolation, § 507(a)(4) is inexorably tied to § 507(a)(3), which provides priority treatment for wages, salaries, or commissions, including vacation, severance and sick leave pay, earned within 90 days before bankruptcy or cessation of the debtor employer's business, but only up to $4,650[12] per employee. It is apparent that § 507(a)(4) is meant to extend this wage priority to other forms of employee compensation, but only to the extent that the priority is not fully utilized by § 507(a)(3). By its terms, the amount given priority under § 507(a)(4) is limited to the difference between the priority claimed under § 507(a)(3) and the $4,650 per employee cap.

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11. Indeed, allowing the insurance companies to share the assets of the estate at a higher level of priority actually can harm the employees, since the employees' § 507(a)(4) priority claims, as well as any non-priority claims they may have, stand to be diluted by the priority claims of the insurance companies. *See Embassy Rest.*, 359 U.S. at 34; *see also Edward W. Minte Co., Inc. v. Franey & Parr (In re Edward W. Minte Co., Inc.)*, 286 B.R. 1, 12 (Bankr. D.C. 2002) ("there will be cases in which the employees' § 507(a)(4) claims will receive a lesser payment if insurers are allowed a § 507(a)(4) priority for extending credit to the debtor").

12. As discussed in footnote 2, this amount is subject to change and is currently set at $10,000.

Sections 507(a)(3) and (a)(4) thus are to be read and applied together, and the term "employee benefit plan" in subsection (a)(4) must be interpreted in a way that is harmonious with the forms of employee compensation that are afforded priority under subsection (a)(3). For the reasons previously stated, workers' compensation insurance mandated by statute is fundamentally different than the forms of employee compensation expressly covered by § 507(a)(3) and that have been held to be wage substitutes falling within the meaning of "employee benefit plan" under § 507(a)(4).

Any extension of § 507(a)(4) beyond its intended scope has the effect of depriving other creditors of their rightful share of the assets of a debtor's estate. Where, as here, the assets of the estate are insufficient to pay all level four priority claims in full, creditors with allowed priority claims that are expressly covered by § 507(a)(4) will be forced to receive less if claims for unpaid workers' compensation insurance premiums are entitled to equal priority. In other cases, expansion of the scope of § 507(a)(4) will have a direct prejudicial effect on creditors holding claims with lower level priorities, or no priority at all. *See Joint Indus. Bd. v. United States*, 391 U.S. 224, 228 (1968) (expansion of priority to include additional claims has effect of reducing funds available to pay existing priority claims or claims of lesser priority).

Tax claims are included within the lower priorities that would be adversely affected by a broadening of the definition of "employee benefit plan." Moreover, such a result would be inconsistent with prior decisions that placed these tax claims, when based upon unpaid worker's compensation premiums, at level seven in the hierarchy of bankruptcy priorities, rather than at level four.

Section 507(a)(7)[13] provides a priority for certain excise tax claims of governmental units. Several courts, including the Fourth Circuit, have held that unpaid workers' compensation premiums due to the state are excise taxes for which the Bankruptcy Code specifically provides a level seven priority pursuant to § 507(a)(7)(E).[14] *See New Neighborhoods, Inc. v. West Virginia Workers' Comp. Fund*, 886 F.2d 714, 720 (4th Cir. 1989) (holding that unpaid workers' compensation premiums due to state compensation fund are entitled to § 507(a)(7) priority as excise taxes).[15]

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13. Section 507(a)(7) was renumbered to § 507(a)(8) under the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394 § 304 (1994).

14. Section 507(a)(7)(E) provides as follows:

> The following expenses and claims have priority in the following order:
>
> . . . .
>
> (7) Seventh, allowed unsecured claims of governmental units, only to the extent that such claims are for –
>
> (E) An excise tax on –
>
> (i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or
>
> (ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition . . .

15. *Accord Yoder v. Ohio Bureau of Workers' Comp. (In re Suburban Motor Freight, Inc.)*, 998 F.2d 338, 339 (6th Cir. 1993).

Indeed, in the course of recognizing a level seven priority for government claims in *New Neighborhoods*, the court seemed to suggest that no such priority existed for private insurers:

> Nor does the fact that, under the holding we state in this case, *a state agency is given, as an insurer, priority in bankruptcy when a private insurer is not* tip the scales against construing the workers' compensation premiums as "excise taxes" (footnote omitted); such a difference is really only a "distinction between the sovereign power of the state and rights of private citizenry."

866 F.2d at 720 (quoting *State Indus. Accident Comm'n v. Aebi*, 162 P.2d 513, 517 (Ore. 1945) (emphasis added). Apparently, when the Fourth Circuit rendered its decision in *New Neighborhoods*, it did not believe that a private insurer such as Zurich had a right to claim a priority for unpaid workers' compensation insurance premiums.[16]

Moreover, there is no basis for reading § 507(a)(4) as granting a level four priority to private insurance companies for unpaid workers' compensation insurance premiums when those same premiums, if owed to the state, are only entitled to level seven priority. If Congress had intended such disparate treatment, it would have stated so explicitly.[17]

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16. Even though this statement in *New Neighborhoods* is at odds with the subsequent decision of the Fourth Circuit in this case, neither concurring opinion below mentions, let alone attempts to resolve, these inconsistent holdings.

17. For example, pursuant to § 507(a)(7)(D) of the Bankruptcy Code, Congress specifically granted a level seven priority to governmental units for "an employment tax on a wage, salary, or (Cont'd)

As this Court held in *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29, 31 (1959), a fundamental principle running through the Bankruptcy Code is that creditors should generally be treated equally, and if the claims of a class of creditors are to receive preferential treatment, the right to such treatment must have been authorized by Congress in clear and precise terms.[18] The plain language of § 507(a)(4) does not contain any clear indication that Congress intended private insurers who are owed unpaid premiums for workers' compensation insurance to receive preferential treatment over governmental units with claims for the same unpaid premiums. *New Neighborhoods* suggests that the contrary is true.[19] Accordingly, Judge King erred when he found that

(Cont'd)
commission *of a kind specified in paragraph (3) of this subsection* earned from the debtor before the filing of the petition, ..." (emphasis added).

18. The court in *New Neighborhoods* acknowledged the importance of this principle, noting that:

> [w]hether workers' compensation premiums are taxes entitled to priority as excise taxes pursuant to 11 U.S.C. § 507(a)(7)(E) is to be determined as a matter of federal law so that the priority provision in the Bankruptcy Code can be "nationwide in its application," *City of New York v. Feiring*, 313 U.S. 283, 285 (1941) (involving a New York City sales tax); *In re Pan Am. Paper Mills, Inc.*, 618 F.2d at 162, and must be answered by reference to the "terms and purposes" of the bankruptcy statute. *New York v. Feiring*, 313 U.S. at 285.

866 F.2d at 718 (parallel citations omitted).

19. As the Sixth Circuit observed in *Birmingham-Nashville Express*, "[i]t is quite common for Congress to provide better treatment in the Bankruptcy Code for government creditors than is provided for private creditors." 224 F.3d at 518.

the plain meaning of the term "employee benefit plan" included workers' compensation insurance policies.[20]

3. Claims for unpaid workers' compensation insurance premiums do not arise from "services rendered."

Not all contributions to an employee benefit plan are entitled to priority under § 507(a)(4). By its express terms, the statute limits priority treatment to those contributions that "arise from services rendered." As with the terms "contributions" and "employee benefit plan," the Bankruptcy Code does not define the term "services rendered." The courts, not surprisingly, are split on the meaning of this term.

The term "services rendered" must first be considered on its face and in the broader context of the priority provisions of the Bankruptcy Code to determine whether its meaning is plain. The language itself does not suggest what type of services are included and by whom they are to be rendered. Nevertheless, the better reasoned cases have held that, given the narrow interpretation that priority provisions are to be given, the term "services rendered" is limited to services rendered by employees (or plan administrators on their behalf), not services rendered by a third party such as an insurance carrier. *See Edward W. Minte Co., Inc. v. Franey & Parr (In re Edward W. Minte Co., Inc.)*, 286 B.R. 1 (Bankr. D.C. 2002); *In re The Montaldo Corp.*, 207 B.R. 112 (Bankr. M.D.N.C. 1997).

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20. If Judge King is correct, then the claims of governmental units for unpaid workers' insurance premiums logically should also be entitled to level four priority, in direct contravention of the Court's earlier decision in *New Neighborhoods*.

For example, relying upon the interplay between §§ 507(a)(3) and (a)(4), the bankruptcy court in *Minte* found that

> [b]y providing for a reduction of § 507(a)(4) priority by the amount of 507(a)(3) claims paid for wages, salaries and commissions arising, of course, from employees' services rendered, and by simultaneously limiting § 507(a)(4) priority to claims for contributions to an employee benefit plan "arising from services rendered," it may be reasonably inferred that the term "services rendered" in § 507(a)(4) refers to services by employees.

286 B.R. at 9.

In addition, the bankruptcy court in *Minte* noted that to extend the term "services rendered" to insurance companies would lead to illogical phraseology.

> If the term "services" includes the provision of insurance, this means that the insurer would be claiming priority for a "claim for [insurance coverage provided] to an employee benefit plan . . . arising from [insurance coverage provided]." This is double talk. The services § 507(a)(4) has in mind are the services of employees (a construction that eliminates such double talk).

Id. Thus, under the plain meaning of § 507(a)(4), insurance premiums for unpaid workers' compensation insurance premiums do not "arise from services rendered" and are not entitled to priority treatment.

4. The holding of *Plaid Pantries* and its progeny should not be adopted by this Court.

In his concurring opinion, Judge King notes that several cases, including the Ninth Circuit's decision in *Plaid Pantries*, have concluded that under the plain language of § 507(a)(4), various claims for unpaid insurance premiums are entitled to priority treatment. *Howard Delivery*, 403 F.3d at 232-233; Pet. App. 9a-11a. For the reasons discussed below, these cases do not support a finding that § 507(a)(4) was meant to include unpaid workers' compensation insurance premiums.

The majority of the cases cited by Judge King deal with unpaid insurance premiums for life, health and/or disability insurance, rather than workers' compensation insurance. *Ivey v. Great W. Life & Annuity Ins. Co.*, 308 B.R. 752 (M.D.N.C. 2004), *aff'd*, 405 F.3d 191 (4th Cir. 2005) (unpaid health insurance premiums); *Principal Mut. Life Ins. Co. v. Joint Comm. of Unsecured Creditors (In re CirrusCorp)*, 196 B.R. 76 (S.D. Tex. 1996) (same); *Allegheny Int'l, Inc. v. Metro. Life Ins. Co.*, 145 B.R. 820 (W.D. Pa. 1992) (unpaid life insurance premiums); *Official Labor Creditors Comm. v. Jet Fla. Sys., Inc. (In re Jet Fla. Sys., Inc.)*, 80 B.R. 544 (S.D. Fla. 1987) (unpaid medical expense reimbursements); *In re A.B.C. Fabrics of Tampa, Inc.*, 259 B.R. 759 (Bankr. M.D. Fla. 2001) (same); *In re Braniff, Inc.*, 218 B.R. 628 (Bankr. M.D. Fla. 1998) (unpaid health and life insurance premiums). These cases do not address the distinct characteristics of workers' compensation premiums, as discussed in Section I.2., *supra*, and are thus inapposite.

The treatment of claims for unpaid workers' compensation insurance premiums was addressed in *Plaid Pantries*, 10 F.3d 605 (9th Cir. 1993), *In re Integrated Health Servs., Inc.*, 291 B.R. 611 (Bankr. D. Del. 2003), and *Perlstein v. Rockwood Ins. Co. (In re AOV Indus., Inc.)*,

85 B.R. 183 (Bankr. D.C. 1988). For various reasons, these cases did not reach the correct result.

For example, in *Plaid Pantries*, 10 F.3d 605, the Ninth Circuit did not perform a detailed analysis of either the plain meaning of § 507(a)(4) or its legislative history, but nevertheless concluded that there was no reason to believe that Congress intended to distinguish between statutorily required coverage such as workers' compensation insurance and contractually promised benefits such as health, welfare and pension plans. Significantly, the court gave no recognition to the underlying principle of bankruptcy law that priorities are to be narrowly construed and failed to consider whether it was the employer, rather than the employee, who was the true beneficiary of workers' compensation liability insurance.

Likewise, in *Integrated Health Servs.*, 291 B.R. 611, the bankruptcy court not only overlooked the need to narrowly construe the priority provisions of the Bankruptcy Code, but in essence embraced an improperly expansive reading of these provisions. The court supported its holding that workers' compensation insurance premiums were to be included in § 507(a)(4) by finding that "there was no clearly expressed legislative intent to exclude workers' compensation benefits form the plain language of § 507(a)(4)." 291 B.R. at 614. Yet, the proper test is not whether there is a clearly expressed legislative intent to **exclude** these benefits, but rather whether there is a clearly expressed legislative intent to **include** them. Since bankruptcy priorities are an exception to the general rule that creditors should share equally in the assets of a bankrupt estate, the inclusion of particular claims within the priority provisions of the bankruptcy code must be authorized by Congress in clear and unequivocal terms. *Embassy Restaurant*, 359 U.S. at 31, 33. A finding that such claims are not expressly excluded is insufficient.

Finally, the priority of workers' compensation insurance premiums was considered in *AOV Indus.*, 85 B.R. 183, in connection with the defense to an action for the avoidance of alleged preferential payments by the debtor. However, as Judge King acknowledges in his concurring opinion, 403 F.3d at 233, Pet. App. 10a, this aspect of the bankruptcy court's decision was dicta, since the court granted summary judgment defeating the preference claims on an entirely different basis.[21]

Accordingly, the cases that have followed the ruling of the Ninth Circuit in *Plaid Pantries* do not present a solid foundation for holding that unpaid workers' compensation insurance premiums are entitled to priority treatment under § 507(a)(4) and do not undermine the sound reasoning of the Sixth, Eighth and Tenth Circuits that have disagreed with the Ninth Circuit's holding in *Plaid Pantries*.

II. The Legislative History of § 507(a)(4) Supports the Plain Meaning That a Claim for Premiums Due Under a Workers' Compensation Insurance Policy Is Not Entitled to Priority Treatment and, in Any Event, Resolves Any Possible Ambiguity in the Language.

Although the plain meaning of § 507(a)(4) is generally the end of the analysis under *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989), a review of the legislative history of the statute is nevertheless appropriate in this case. This Court, in *Ron Pair*, recognized that a review of the legislative history is appropriate to determine whether "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." 489 U.S. at 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). Citing to two bankruptcy cases, *Mid-Atlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection*, 474 U.S. 494 (1986) and *Kelly v. Robinson*, 479

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21. *Accord Minte*, 286 B.R. 1, 5 n.10 (the conclusions of the court in *AOV Indus.* regarding § 507(a)(4) were unnecessary dicta).

U.S. 36 (1986), the Court in *Ron Pair* recognized that "in an appropriate case, a court must determine whether Congress has expressed an intent to change the interpretation of a judicially created concept in enacting the Code." 489 U.S. at 245. In this case, it is appropriate to consider the legislative history behind § 507(a)(4) to ensure that any given interpretation of this provision is not at odds with the underlying principle that bankruptcy priorities are to be narrowly construed. Alternatively, it is appropriate to look to the legislative history if the language of § 507(a)(4) is found to be ambiguous. *See, e.g., Southern Star Foods*, 144 F.3d at 715 ("Because the phrase [contributions to an employee benefit plan] is ambiguous, we turn to the legislative history of the statute to aid our analysis.").

Regardless of the justification, a review of the Congressional intent confirms that when Congress granted priority treatment to claims for "contributions to an employee benefit plan arising from services rendered," it intended such treatment only for certain employee fringe benefits, such as health, welfare and pension plans, that served as bargained-for wage substitutes, and not for workers' compensation insurance premiums mandated by state law.

Congress enacted § 507(a)(4) in 1978 specifically to overrule the holdings of this Court in *Embassy Restaurant*, 359 U.S. 29 (1959), and *Joint Industrial Board*, 391 U.S. 224 (1968). Those cases rejected the argument that fringe benefits were "wages . . . due to workmen" entitled to priority treatment under 11 U.S.C. § 104(a)(2), the predecessor to § 507(a)(4).[22] Section 507(a)(4) was a direct response to these cases. As the House Report explained:

> Paragraph (4) overrules *United States v. Embassy Restaurant*, which held that fringe benefits were

22. In *Embassy Restaurant*, 359 U.S. at 29, the fringe benefits were contributions to a union welfare plan; in *Joint Industry*, 391 U.S. at 225, they were contributions to a union annuity plan.

> not entitled to wage priority status. The bill recognizes the realities of labor contract negotiations, **under which wage demands are often reduced if adequate fringe benefits are substituted.** The priority granted is limited to claims for contributions to employee benefit plans such as pension plans, health or life insurance plans, and others, arising from services rendered[.]

H.R. Rep. No. 95-595, at 357 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 (internal citation omitted) (emphasis added).

The legislative history makes it clear that this new provision was intended to cover bargained-for fringe benefits that served as wage substitutes:

> The Supreme Court has held that the wage priority does not extend to fringe benefits, such as pension fund or health insurance contributions. When the wage priority was last amended in 1926, perhaps the intent of Congress was not to extend it in that fashion, because fringe benefits were little heard of at the time. Now, however, to ignore the reality of collective bargaining that often trades wage dollars for fringe benefits, does a severe disservice to those working for a failing enterprise.
>
> . . . [T]he bill establishes a new category, a fourth priority immediately following the wage priority, for contributions and payments to employee benefit plans. This will include health insurance programs, life insurance plans, pension funds **and all other forms of employee compensation that is not in the form of wages**.

Id. (emphasis added).[23] *Accord* S. Rep. No. 95-989, at 69 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5855.

Finally, the Senate Report confirms that §§ 507(a)(3) and (a)(4) are to be read together to provide employees with priority treatment for unpaid wages and fringe benefits.

> Under current law, employees currently are allowed a $600 priority for unpaid wages, which does not include any claims for contributions to employee benefit plans such as pension, health and life insurance plans. The Bill's priority section will raise the $600 limit to $1,800 and create an additional separate priority of up to $1,800 for fringe benefits. **Any one employee's combined priority for wages and fringe benefits, however, cannot exceed $1,800.**

S. Rep. No. 95-989, *reprinted in* 1978 U.S.C.C.A.N. at 5791-92 (emphasis added).

The legislative history recognizes "fringe benefits" as a voluntary substitute for wages. This is consistent with the accepted definition of "fringe benefits" as "an employment benefit (as a pension, a paid holiday, or health insurance) granted by an employer that involves a money cost without affecting basic wage rates." *Webster's Ninth New Collegiate Dictionary* 494 (1987).

Workers' compensation insurance policies, by contrast, are not fringe benefits.

> Workers' compensation coverage . . . is not a fringe benefit that an employee can bargain for, either

23. These changes are described under the heading "Wages and Fringe Benefits." H.R. Rep. No. 95-595, at 357 (1977).

> explicitly or impliedly, in lieu of higher wages. It is not a fringe benefit or wage substitute, as contemplated by Congress in enacting § 507(a)(4). In addition, the legislative history indicates that workers' compensation is not an employee benefit plan because the coverage benefits the employer at least as much, if not more, than the employee.

Southern Star Foods, 144 F.3d at 716. The Sixth Circuit, in *Birmingham-Nashville Express*, reached the same conclusion, holding that "the term 'employee benefit plan' is limited to wage substitutes" and "workers' compensation is not a wage substitute; rather, it is an award arising out of a work-related injury owed by an employer." 224 F.3d at 517.

The District Court in *HLM Corp.* carefully considered whether a workers' compensation insurance policy obtained pursuant to Minnesota's workers' compensation statute was a fringe benefit falling within the definition of "employee benefit plan." 183 B.R. 852 (D. Minn. 1994), *aff'd* 62 F.3d 224 (8th Cir. 1995). The court's analysis, which is equally applicable to the West Virginia statute, underscores the fundamental differences between workers' compensation coverage on the one hand, and the health, welfare and pension plans that fall with the scope of § 507(a)(4):[24]

> Payments for a workers' compensation policy are not bargained-for substitutes for wages. In Minnesota, they are mandated by statute. . . .

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24. Of course, the resolution of this issue should not hinge upon which state's workers' compensation statute is applicable. Bankruptcy priorities must be applied not just narrowly, but uniformly. *See, e.g., City of New York v. Feiring*, 313 U.S. 283, 285 (1941) (bankruptcy priorities are intended to be nationwide in their application and not controlled or varied by state law).

> Thus, in "the realities of contract negotiations," unlike medical, health and life insurance, payment of workers' compensation premiums is irrelevant to the bargaining process. Employers may not choose to forego purchasing workers' compensation insurance, and employees may not choose to accept a higher wage in lieu of the insurance. As a result, payments to a workers' compensation insurance carrier are not bargained-for wage substitutes.

Id. at 856. The Eighth Circuit affirmed this analysis in *HLM Corp.*, 62 F.3d 224, 225 (8th Cir. 1995).

Furthermore, unlike pension plans and life, health and disability insurance plans that inure directly and exclusively to the benefit of the employee, workers' compensation insurance inures to the benefit of the employer by providing a means for the employer to allocate risk. It allows an employer to make a finite, predictable outlay rather than risking unpredictable and potentially crippling workers' compensation payments to injured employees. The employee's right to payment is exactly the same, regardless of whether it comes directly from the employer or indirectly from the carrier. This right to payment is fixed by statute and totally unaffected by the insured or uninsured status of an employer. *HLM Corp.*, 183 B.R. at 856.

In his concurring opinion below, Judge King rejects the holdings of the Sixth, Eighth and Tenth Circuits that found that Congress did not intend unpaid workers' compensation insurance premiums to receive priority treatment. Agreeing instead with the Ninth Circuit in *Employers Insurance of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605 (9th Cir. 1993), Judge King asserted that, while benefits did admittedly flow to Howard pursuant to the workers' compensation insurance policy issued by Zurich, the coverage "plainly inured to the benefit of Howard's employees." *Howard Delivery Serv.*, 403 F.3d at 237, Pet. App. 19a. However, Judge King's ruling, as

is true of the Ninth Circuit's ruling in *Plaid Pantries*, inappropriately broadens the scope of § 507(a)(4) in contravention of the purpose and plain language of the priority provisions of the Bankruptcy Code.

Moreover, the ruling in *Plaid Pantries* was premised on the faulty propositions that workers' compensation benefits are comparable to other forms of compensation because they "are generally funded by insurance, the premiums for the insurance are paid by the employers, and the costs are passed on in the form of lower wages and higher prices." *Plaid Pantries*, 10 F.3d at 607. Yet, in West Virginia and elsewhere, this simply is not the case.

First, § 23-2-7 of the West Virginia workers' compensation statute prohibits parties from bargaining away their rights and responsibilities under the statute.[25] Thus, there is no basis to conclude that workers' compensation insurance is a benefit received in lieu of higher wages. Second, the argument ignores the fact that employees in West Virginia receive workers' compensation coverage even when the employer fails to pay the premiums due a third party such as Zurich. As employees receive the same coverage whether or not the premiums are paid, there is no reason why § 507(a)(4) should be broadened to include claims for these unpaid premiums.[26]

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25. "No employer or employee shall exempt himself from the burden or waive the benefits of this chapter by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be *pro tanto* void." W. VA. CODE § 23-2-7 (1988).

26. As discussed in Section I.2. *supra*, if the premiums are due directly to the West Virginia Workers' Compensation Fund, the Fund is entitled to a level seven priority based upon the priority granted to certain taxes. There is nothing in the language of the statute or the legislative history to suggest that Congress intended private insurers to receive a higher level of priority than is provided the Fund.

The fringe benefits falling within the definition of "employee benefit plans" all have one common feature — the sole beneficiary **is the employee**. These fringe benefits are consistent with the congressional intent that led to the addition of § 507(a)(4) to the wage priority of § 507(a)(3), for these priorities were intended to work collectively to protect employees and their representatives.[27] By contrast, the party that principally benefits from the issuance of a workers' compensation insurance policy **is the employer**, as the insured under the policy. With or without the workers' compensation insurance policy, the employee is still entitled to the benefits provided by the workers' compensation statute. If the employer fails to pay the insurance premiums, the employee retains the right to pursue his common law tort claims and the defaulting employer loses the common law defenses of the fellow-servant rule, assumption of risk and contributory negligence.[28]

Thus, there is a fundamental difference between workers' compensation insurance policies that are provided pursuant to statute, and health, welfare and pension plans that are provided as an employee fringe benefit. The legislative history of § 507(a)(4) demonstrates that only the latter were intended by Congress to receive priority treatment under the Bankruptcy Code. The Fourth Circuit's contrary reading of § 507(a)(4) violates the underlying principle that priorities be construed narrowly and the admonition of this Court in *Embassy Restaurant* that "if one claimant is to be preferred

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27. The House Report states that the purpose of the 1978 Amendment to § 507(a) was to "provide additional protection to the employees of a bankrupt enterprise." This was accomplished through two changes in "the wage priority." First, the priority for wages was increased from $600 to $2,400. Second, § 507(a)(4) was added to cover "forms of employee compensation that is not in the form of wages." H.R. Rep. No. 95-595, at 357 (1977).

28. *See, e.g.*, W. VA. CODE § 23-2-8 (1988).

over others, the purpose should be clear from the statute." 359 U.S. at 31. In the absence of clear language that claims for unpaid workers' compensation insurance premiums are to be included within § 507(a)(4), the Court below was not free to create such a priority.

CONCLUSION

Section 507(a)(4) of the Bankruptcy Code establishes a priority for "contributions to an employee benefit plan arising from services rendered." This priority, like all bankruptcy priorities, must be narrowly construed, and a claim may only receive priority treatment when authorized by Congress in clear and unequivocal terms.

The Fourth Circuit erred in holding that the plain language of § 507(a)(4) extended to unpaid workers' compensation insurance premiums. Furthermore, to the extent the language of § 507(a)(4) is ambiguous, the Fourth Circuit did not correctly interpret and apply the legislative intent of the priority statute. As a result, the Fourth Circuit improperly expanded the scope of § 507(a)(4) of the Bankruptcy Code to the detriment of other creditors.

For all of the reasons stated herein, Howard and the Committee respectfully request that this Court reverse the decision of the Fourth Circuit and deny priority treatment to Zurich's claim for unpaid insurance premiums.

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IN THE

Supreme Court of the United States

HOWARD DELIVERY SERVICE, INC., *et al.*,
Petitioners,

v.

ZURICH AMERICAN INSURANCE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether payments due from a debtor under insurance policies that provide workers' compensation benefits to the debtor's employees who are injured on the job during the 180 days before the debtor's bankruptcy are debts for "contributions to an employee benefit plan arising from services rendered within 180 days before the date of the filing of the [bankruptcy] petition" under 11 U.S.C. § 507(a)(4)?

RULE 29.6 STATEMENT

The respondent is Zurich American Insurance Company. Its parent corporations are Zurich Holding Company of America, Inc., Zurich Insurance Company, Crown Management Services Limited, Zurich Group Holding, Zurich Financial Services, and Allied Zurich plc.

No publicly held company owns 10% or more of respondent's stock.

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Workers' compensation provides health, disability, and death benefits that are vitally important to millions of workers and their families, especially those employed in dangerous occupations. Indeed, workers' compensation benefits are so important to employee welfare that the vast majority of States require employers not only to provide these benefits to their employees, but also to guarantee payment of the benefits through insurance or similar means. Had States not long ago made these benefits mandatory, workers' compensation would surely be a common feature of bargained-for employee benefit packages today.

Petitioners nevertheless contend that employer contributions owed to workers' compensation benefit plans should be excluded from the priority for "contributions to employee benefit plans" under § 507(a)(4) of the Bankruptcy Code, precisely because States require employers to provide these benefits.[1] Nothing in the text, legislative history, or purpose of the statute supports that counterintuitive result. The plain text of § 507(a)(4) encompasses all employee benefit plans – including those through which employers provide workers' compensation – irrespective of whether States mandate the benefits or whether they are "bargained-for wage substitutes."

Petitioners' "bargained-for wage substitute" test is an arbitrary extratextual restriction on the scope of § 507(a)(4) that cannot be justified on any ground and that perversely denies statutory protection to the very forms of employee benefits States have deemed most important. In contrast,

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[1] Unless otherwise noted, citations to the Bankruptcy Code in this brief are to the Code before its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 215 ("2005 Act"). The 2005 Act does not apply here because Howard entered bankruptcy before the Act's effective date. *See id.* § 1501. The provision the parties refer to as § 507(a)(4) is now renumbered, with changes that are not relevant here, as § 507(a)(5) (as amended 2005).

enforcing § 507(a)(4) according to its terms directly advances the core purpose for which Congress enacted that provision – protecting the financial integrity of employee benefit plans.

STATEMENT

A. Factual Background

Before its bankruptcy, petitioner Howard Delivery Service, Inc. ("Howard") operated a freight trucking business with terminals in Illinois, Michigan, Ohio, and West Virginia, and operations in surrounding States.[2] In the 1990s, Howard had as many as 480 employees, most unionized.

Howard obtained insurance under two policies from respondent Zurich American Insurance Company ("Zurich") to provide workers' compensation benefits to Howard's employees in 10 States.[3] The insurance did not cover Howard's workers in West Virginia or Ohio because those are (or were) "monopolistic" States that do not permit private workers' compensation insurance. *See* Ohio Rev. Code Ann. §§ 4123.30-4123.35; W. Va. Code § 23-3-1; *infra* at 8-9.[4]

Under the policies, Howard was liable to Zurich for two kinds of payments: (1) the initial premiums specified in the policies, and (2) retrospective "loss sensitive" adjustments to

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[2] Background facts concerning Howard are taken from the First Amended Disclosure Statement for Chapter 11 Plan of Reorganization of Official Committee of Unsecured Creditors (Dkt. #297, filed Dec. 23, 2002) ("Disclosure Statement"). Docket number references are to the bankruptcy docket for *In re Howard Delivery Service, Inc.*, Case No. 02-30289 (Bankr. N.D. W. Va.).

[3] The 10 States are Iowa, Illinois, Indiana, Kentucky, Maryland, Michigan, New York, Pennsylvania, Virginia, and Wisconsin.

[4] The Fourth Circuit mistakenly assumed that the Zurich policies covered Howard's West Virginia employees. Pet. App. 3a. Howard's brief reflects the same misconception. *E.g.*, Pet'rs Br. 14, 18, 32, 50.

the premiums, up or down, based on Howard's actual loss experience ("retrospective rating"). Howard thereby retained much of the risk of workers' compensation costs.[5]

In accordance with legal requirements for workers' compensation insurance, each policy provides that while Zurich may cancel the policy for non-payment subject to certain restrictions, Zurich will continue to pay workers' compensation benefits arising from on-the-job accidents that occur while the policy is in effect, even if Howard defaults on its payment obligations to Zurich. *See, e.g.*, N.Y. Workers' Comp. Law § 54(3). These benefit can extend decades into the future. *See infra* at 8. Thus, like a pension trust fund, workers' compensation insurance serves to secure the payment of benefits to employees long after an employer might have gone out of business. *Id.*

In 2001, Howard lost its major customer and could no longer operate profitably. Rather than shut down immediately, Howard attempted to maximize the value of its assets for creditors and minimize disruption to its work force through an orderly wind-down of its business outside of bankruptcy. Because of its financial difficulties, Howard stopped paying amounts due to Zurich under the workers' compensation policies approximately six months prior to filing for bankruptcy. Zurich could have responded by canceling the policies so that it would not have to pay benefits to workers who were injured after cancellation.[6] But cancellation would have forced Howard out of business because it operates in jurisdictions that require employers to carry workers' compensation insurance (or meet stringent

---

[5] In some cases, Howard's "loss sensitive" responsibility was slightly different: Howard was liable for a deductible up to $250,000 per claim.

[6] Zurich would have had to give advance notice to state regulators and to Howard before cancellation. *E.g.*, 820 Ill. Comp. Stat. 305/4(b) (10 days' notice); Va. Code Ann. § 65.2-804(B) (30 days' notice).

self-insurance requirements that a financially insecure company cannot satisfy). *See infra* at 8-10. Zurich forbore cancellation for several months despite Howard's impending insolvency. Finally, on January 30, 2002, Howard sought bankruptcy protection by filing a voluntary Chapter 11 petition.

B. Proceedings Below

Howard is presently being liquidated under a Chapter 11 plan confirmed by the bankruptcy court. As the estate's assets are concededly insufficient to pay all unsecured claims entitled to priority under 11 U.S.C. § 507, no distribution of proceeds will be made for non-priority unsecured claims. *See infra* note 9.

Zurich filed a proof of claim in Howard's bankruptcy seeking all amounts Howard owes under the policies for Zurich's undertaking to pay workers' compensation benefits to Howard's employees injured on the job during the 180 days immediately prior to bankruptcy. Zurich invoked 11 U.S.C. § 507(a)(4), which provides a priority for unpaid contributions to employee benefit plans arising from services rendered within 180 days of a bankruptcy filing. *See* J.A. 32a.[7] As required by the Bankruptcy Code, Zurich liquidated its priority claim by ascertaining the amount Howard owes, after taking into account retrospective loss-sensitive adjustments, for Zurich's provision of workers' compensation benefits to Howard's employees who, during

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[7] Initially, Zurich claimed administrative expense priority for this claim under 11 U.S.C. § 507(a)(1), but subsequently amended the proof of claim to assert the correct priority under § 507(a)(4). J.A. 32a. Zurich also filed a second proof of claim, which is not at issue here, for amounts due from Howard for benefits to employees injured more than 180 days before its bankruptcy.

the 180-day period, were injured on the job. *See* J.A. 33a-36a.[8]

Howard objected on the ground that Zurich is not entitled to priority under § 507(a)(4). The bankruptcy court agreed, holding that § 507(a)(4) applies only to "bargained-for, wage-substitution-type benefits" and that workers' compensation is not bargained-for. Pet. App. 57a. The district court affirmed. Pet. App. 39a.

On further appeal, the Fourth Circuit reversed. Judge King found that the plain language of § 507(a)(4) covers the payments due from Howard to Zurich. Pet. App. 8a. Reaching the same result, Judge Shedd concluded that "employee benefit plan" might be ambiguous, but that the legislative history indicates that Congress intended this phrase to have the same meaning in § 507(a)(4) as it does in the Employee Retirement Income Security Act ("ERISA"), where it indisputably covers workers' compensation insurance. Pet. App. 23a. Judge Niemeyer dissented, reasoning that the priority applies only to a "wage surrogate." Pet. App. 36a.[9]

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[8] Zurich's claims were reduced to reflect amounts it received under a letter of credit Howard had posted as partial security. That security did not satisfy the debt, however. *See* J.A. 15a-17a.

[9] Before deciding the case, the Fourth Circuit directed the parties to address whether the lower court decisions were final and appealable. Zurich and Howard agreed that the decisions were final: because the estate cannot pay any non-priority claims (*see* Disclosure Statement, at 22), denial of priority is tantamount to denial of Zurich's claim. Zurich also filed a Rule 28(j) letter stipulating that it would withdraw its claim if the priority ruling were affirmed. These considerations satisfied the Fourth Circuit. *See* Pet. App. 7a n.6.

C. The Legal Framework for Workers' Compensation and Other Employee Benefits

Because the statutory construction issue in this case ultimately depends on whether workers' compensation insurance should be considered an employee benefit plan for purposes of § 507(a)(4), it is important at the outset to have a clear understanding of exactly what workers' compensation is, how it is typically provided, and how it relates to other types of employee benefits and employee benefit plans.

1. Workers' Compensation Benefits

Rapid industrialization in the late nineteenth century led to an alarming increase in the number of employees injured at work, but common-law tort defenses often prevented the injured employees from recovering damages from their employers. *See* 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 2.03, at 2-3 to 2-6 (1999) (hereinafter "Larson"). Many workers disabled on the job were thus left unable to support themselves or their families. In response, "[i]n the early 20th century, States began to replace the common-law system, which often saddled employees with the difficulty and expense of establishing negligence or proving damages, with a compulsory insurance system requiring employers to compensate employees for work-related injuries without regard to fault." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 44 (1999); *see also* 1 Larson §§ 2.07-2.08, at 2-13 to 2-18 (2002 Supp.). Workers' compensation is thus a no-fault state law system for providing benefits to employees who suffer a disabling injury or disease in connection with their employment.[10]

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[10] Federal law also requires workers' compensation for certain workers under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") and its extensions. 33 U.S.C. § 901 *et seq.*; *see also, e.g.*, 42 U.S.C. § 1651 (private employees at U.S. defense bases abroad).

Benefits provided by workers' compensation. Workers' compensation laws require employers to provide three types of benefits to employees who are injured on the job: payment of medical expenses; payment of a portion of wages lost due to disability; and payment of a "death benefit" to the employee's survivors in the case of fatality. *E.g.*, 820 Ill. Comp. Stat. 305/7, 305/8(a)-(b); 33 U.S.C. §§ 902(2), 904, 907-909.[11] In contrast to social welfare programs, workers' compensation places the cost of these benefits on an injured worker's employer, rather than on the government, taxpayers, or society in general. 1 Larson § 1.04, at 1-14 (2002 Supp.); *see also, e.g.*, *Eversman v. Concrete Cutting & Breaking*, 614 N.W.2d 862, 864 (Mich. 2000) (workers' compensation "allocat[es] the burden of these payments to the employer"). This gives the employer an incentive to reduce the risk of employee injury by implementing appropriate health and safety measures. *See generally, e.g.*, Richard B. Victor, *Workers' Compensation and Workplace Safety* 1-47 (1982); Guido Calabresi, *The Cost of Accidents* 68-94 (1970).

Workers' compensation benefits are usually the exclusive remedy for work-related illness or injury, and a covered employee may not sue for damages. While exclusivity is a *quid pro quo* to employers for the employee's certain recovery upon injury, "the primary purpose of [workers' compensation laws] is to benefit the worker." *Griffin Pipe Prods. Co. v. Guarino*, 663 N.W.2d 862, 865 (Iowa 2003); *accord infra* note 17 (citing cases). For this reason, most States compel employers to provide workers' compensation

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[11] The U.S. Department of Labor provides an overview of variations among state workers' compensation laws. *See* U.S. Dep't of Labor, Table 1 (2005), *at* http://www.dol.gov/esa/regs/statutes/owcp/stwclaw/tables-pdf/table1.pdf; *see also* U.S. Chamber of Commerce, Statistics & Research Ctr., *Analysis of Workers' Compensation Laws* (2005).

benefits and secure their payment, rather than giving employers the choice whether to do so. *See infra* at 9-10.

The role of insurance. A critical feature of all workers' compensation laws is the employer's duty not only to pay benefits to injured employees, but also to secure the payment of these benefits. *E.g.*, N.Y. Workers' Comp. Code § 50; 33 U.S.C. §§ 904(a), 932(a). As with pensions, workers' compensation benefits may be payable for years or even decades, as when a worker is permanently disabled. *E.g.*, 820 Ill. Comp. Stat. 305/8(f); 33 U.S.C. § 908(a).

In most States, an employer can meet this obligation by obtaining insurance from a private insurer or by self-insuring (*i.e.*, assuming its own losses). *E.g.*, 820 Ill. Comp. Stat. 305/4; 33 U.S.C. § 932(a). Workers' compensation laws require a private insurance policy to provide benefits to employees whose injuries occur while the policy is in effect, even if the employer becomes insolvent and does not pay the premium or deductible. *E.g.*, N.Y. Workers' Comp. Law § 54(3); 33 U.S.C. § 936(a). These mandates secure the payment of benefits for employees, as opposed to managing risk for employers.

Private insurers are the sole source of workers' compensation insurance in 26 States and under the LHWCA. Nineteen other States also have state-administered workers' compensation funds that compete with private insurers in those States and serve the same function. *E.g.*, Ky. Rev. Stat. Ann. § 342.801(2); Ariz. Rev. Stat. § 23-981. Until recently, five States (North Dakota, Ohio, Washington, West Virginia, and Wyoming) had "monopolistic" state-administered funds and did not allow private insurance (although they permit self-insurance). *E.g.*, Ohio Rev. Code Ann. §§ 4123.30-4123.35. On January 1, 2006, West Virginia began a transition from its state fund – which was plagued by a $3 billion deficit – to a system relying on

private workers' compensation insurance. *See* W. Va. Code §§ 23-2C-1 to 23-2C-23.

"Self-insurance" is something of a misnomer, in that a self-insuring employer undertakes to pay benefits directly to employees, without insurance. An employer generally may self-insure only if it first establishes that it has the financial ability to pay workers' compensation benefits directly. *E.g.*, 820 Ill. Comp. Stat. 305/4(a)(1); 33 U.S.C. § 932(a)(2). Self-insurers usually must post a bond or other security as collateral and pay assessments to a guaranty fund. *E.g.*, Ky. Rev. Stat. Ann. § 342.906; 820 Ill. Comp. Stat. 305/4(a)(2); 33 U.S.C. § 932(a)(2). Financially insecure employers – such as Howard prior to bankruptcy – obviously cannot meet the stringent requirements for self-insurance, and many financially sound companies find the requirements too onerous to make self-insurance attractive.

Mandatory and elective workers' compensation systems. In nearly every jurisdiction, participation in the workers' compensation system is mandatory for most employers. *E.g.*, 820 Ill. Comp. Stat. 305/4; 33 U.S.C. § 932(a). An employer that fails to secure the payment of benefits operates unlawfully and is subject to serious penalties, often including criminal liability; it also forfeits its tort immunity and common law defenses to suit by injured employees. *E.g.*, 820 Ill. Comp. Stat. 305/4(d); 33 U.S.C. §§ 905(a), 938.

Even in these "mandatory" jurisdictions, however, workers' compensation is sometimes elective. Limited classes of employers are often exempted from mandatory coverage requirements, but such employers are nevertheless permitted to opt in. *E.g.*, Tenn. Code Ann. § 50-6-106(5) (excluding most employees of small businesses employing fewer than five individuals but permitting their employers to elect to cover them); Mich. Comp. L. § 418.118(2)

(excluding most domestic workers but permitting their employers to elect coverage).

Three States – New Jersey, Texas, and Wyoming – characterize workers' compensation as elective. N.J Stat. Ann. § 34:15-7; Tex. Labor Code Ann. § 406.002; Wyo. Stat. Ann. § 27-14-108 (mandating workers' compensation only for "extrahazardous" occupations). In New Jersey, however, features of the workers' compensation law tend to compel employers to participate, so that (in the words of the U.S. Department of Labor) "[t]echnically coverage is elective, but practically compulsory."[12]

Fall-back funds. Despite legal requirements that employers secure payment of benefits, in some cases neither the employer nor an insurer is available to pay benefits to injured workers. This can occur if the employer unlawfully operates without workers' compensation insurance; qualifies for self-insurance but becomes insolvent; or insures but the insurer becomes insolvent. Given the importance of workers' compensation, States generally have fall-back funds to pay benefits in these circumstances. Many States have uninsured employer funds to pay benefits to workers whose employers did not have insurance and have become insolvent, *e.g.*, 820 Ill. Comp. Stat. 305/4(a)(2), while all States have insurance guaranty funds to pay benefits underwritten by an insurer that has become insolvent, *e.g.*, 215 Ill. Comp. Stat. 5/535 (2005). Assessments are typically imposed on all self-insured employers and/or insurers to fund these fall-back benefits.

While the safety net provided by workers' compensation is generally sound, it is not immune to strains from cumulative insolvencies. For example, New York recently

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[12] U.S. Dep't of Labor, Table 1 (2005), *at* http://www.dol.gov/esa/regs/statutes/owcp/stwclaw/tables-pdf/table1.pdf.

authorized an emergency loan of up to $70 million to its Workers' Compensation Security Fund so that the fund could meet its obligations. 2005 N.Y. Sess. Law News, ch. 33 (McKinney). Even if the system as a whole remains solvent, when an employer fails to pay its contributions to the system, the cost of providing benefits to that employer's workers (whether by an insurer or a back-up fund) is shifted to the State or to other employers, thereby raising the overall cost of providing workers' compensation. *See* Meg Green, *Clean-up Operation: State Guaranty Funds are Handling the Messy Details from a Rash of Insolvent Property/Casualty Companies*, Best's Review 50 (Feb. 1, 2004).

2. Disability Benefits

Like workers' compensation, disability benefits replace the wages of an employee who cannot work due to injury or illness. Disability benefits differ from workers' compensation principally in that they cover disabling injury or illness that is unrelated to work. Employers may also elect to offer disability benefits for workplace injuries above the benefit levels set by workers' compensation laws.

Unlike workers' compensation, disability coverage is elective in most States. But five States require most employers to carry temporary disability insurance ("TDI") for their employees. Cal. Unemp. Ins. Code § 2601 *et seq.*; Haw. Rev. Stat. §§ 392-1 to 392-101; N.J. Stat. Ann. §§ 43:21-25 to 43:21-65; N.Y. Workers' Comp. Law §§ 200-242; R.I. Gen. Laws §§ 28-39-1 to 28-41-33. Railroads must also provide TDI under federal law. 45 U.S.C. §§ 351-369. Mandatory TDI programs are administered much like workers' compensation.

3. ERISA Benefits

The last major piece of the employee benefits puzzle is the regulation of employee benefit plans by ERISA, which

was enacted just a few years before § 507(a)(4) was added to the Bankruptcy Code. ERISA defines an "employee benefit plan" as either an "employee pension benefit plan" or an "employee welfare benefit plan." 29 U.S.C. § 1002(3). An "employee pension benefit plan" is one providing retirement income. *Id.* § 1002(2). An "employee welfare benefit plan" is one that provides other types of benefits, including provision of workers' compensation benefits through insurance. *Id.* § 1002(1); *see infra* at 38-39.

Although Congress recognized in ERISA that workers' compensation insurance is a type of employee benefit plan, Congress also sought to preserve the States' historical power to mandate and regulate workers' compensation. Congress therefore exempted employee benefit plans "maintained solely for the purpose of complying with applicable workmen's compensation laws" from ERISA's operative provisions, as well as from its broad clause preempting state laws that "relate to any employee benefit plan." 29 U.S.C. §§ 1003(b)(3), 1144(a).

ERISA prescribes administrative safeguards for plans to which its operative provisions apply, but it generally does not require employers to provide any particular benefits. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90-91 (1983). There are exceptions; for example, ERISA mandates that group health plans cover a 48-hour hospital stay after childbirth. 29 U.S.C. §§ 1185-1185b. ERISA's broad preemption rule generally prevents States from imposing additional benefits requirements on employee benefit plans, *see Shaw*, 463 U.S. at 95-100 – except, of course, for state laws mandating workers' compensation or similar benefits, which are exempted from preemption precisely to preserve the authority of the States to compel employers to provide those benefits. 29 U.S.C. § 1144(a).

One of ERISA's central purposes is to secure the payment of pension benefits that an employer promises to employees. ERISA generally requires all plan assets to be held in a trust (unless the assets take the form of insurance, which is an alternative way of securing benefits). 29 U.S.C. § 1103. ERISA also imposes detailed participation, vesting, and accrual requirements for employees' entitlement to pension benefits, and minimum contribution requirements from employers to fund those benefits. *E.g.*, 29 U.S.C. §§ 1052-1054, 1081-1086, 1421-1426. Under these requirements, an employee is entitled to pension benefits "'solely on the basis of service performed for a participating employer, regardless [of] whether that employer ... has made or defaulted on his required contributions.'" *Cent. States, SE & SW Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 567 n.7 (1985) (quoting Dep't of Labor Advisory Opinion); *see also, e.g., Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 416-20 (1995). Thus, when a contributing employer defaults, a pension fund must still pay accrued benefits to the defaulter's employees. Many multiemployer funds have thousands of contributing employers to make up any shortfall and ensure payment of benefits.[13] And if a pension fund does become insolvent, the Pension Benefit Guaranty Corp. ("PBGC") exists as a fall-back fund guaranteeing payment of

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[13] For example, Howard contributed to the Central States, Southeast and Southwest Areas Fund ("Central States Fund"), which has a large claim against Howard potentially entitled to § 507(a)(4) priority. *See* Sched. E, Pet. & Stmt. of Fin. Affairs [Dkt. 1]. The Central States Fund has thousands of participating employers, and had assets in excess of $17.7 billion at the end of 2003. *See* http://www.centralstatesfunds.org/cs/OurCompany.asp; *see also Cent. States*, 472 U.S. at 561 n.1.

at least a portion of promised benefits. *See* 29 U.S.C. § 1301 *et seq.*[14]

SUMMARY OF ARGUMENT

Zurich's claim for amounts due from Howard is entitled to priority under § 507(a)(4) as a "claim[] for contributions to an employee benefit plan . . . arising from services rendered within 180 days of the filing of the [bankruptcy] petition."

Zurich's entitlement to the priority here is plain and unambiguous. Zurich's workers' compensation policies establish an "employee benefit plan" – *i.e.*, a scheme determined in advance for providing Howard's employees with health, disability, and death benefits, which are paradigmatic employee benefits. Zurich's "claim" is "for contributions," which simply means the payments Howard is obligated to make to the plan, *i.e.*, the amounts due under the policies. And the claim "arises from services rendered within 180 days" before bankruptcy, because it represents the amount due for coverage that Howard obtained for its workers who performed services during the 180-day period.

Notwithstanding this unambiguous statutory text, Howard insists that § 507(a)(4) applies only to "bargained-for wage substitutes," not to employee benefits that are mandated by law (such as most workers' compensation). Howard makes a halfhearted attempt to tease support for its position from the text of § 507(a)(4), but none of its textual arguments withstands scrutiny. That is not surprising, because the origin of the notion that § 507(a)(4) protects only "bargained-for wage substitutes" is not the statutory text, but inferences from the legislative history. Howard's argument

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[14] ERISA does not require such guarantees for employee welfare benefits. However, some multiemployer welfare plans provide for payment of benefits to employees even if their employer defaults on its contributions. *See, e.g., Eastern Enters. v. Apfel*, 524 U.S. 498, 510-11 (1998).

therefore boils down to a plea to replace the more inclusive phrase Congress enacted with a narrower test for eligibility that appears nowhere in the statute. As it has in the past, the Court should reject that invitation to rewrite the Bankruptcy Code based on the view that Congress might have meant something different from what it said. *E.g.*, *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 307 (2003) ("We think Congress meant what it said"); *Patterson v. Shumate*, 504 U.S. 753 (1992); *Union Bank v. Wolas*, 502 U.S. 151 (1991); *Toibb v. Radloff*, 501 U.S. 157 (1991); *United States v. Ron Pair Enters, Inc.*, 489 U.S. 235 (1989).

Howard's position is that § 507(a)(4) should be limited to the particular circumstances identified in the legislative history. Specifically, Howard focuses on legislative materials suggesting that the catalyst for enactment of § 507(a)(4) was the desire to "overrule" *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29 (1959), and *Joint Industry Board of the Electrical Industry v. United States*, 391 U.S. 224 (1968), which held that contributions to benefit plans under collective bargaining agreements were not entitled to the then-existing priority for wages in the predecessor to § 507(a)(3). But this Court has emphatically rejected exactly that type of argument many times before. Broad statutory language may not be construed narrowly merely because it encompasses situations in addition to those on which Congress focused at the time of enactment. *Union Bank*, 502 U.S. at 157-58; *Toibb*, 501 U.S. at 161-63. It would be particularly inappropriate to do so here, because the drafting history of § 507(a)(4) shows that Congress deliberately chose the phrase "employee benefit plan" to be as all-encompassing as possible.

Nor can Howard justify its restrictive reading of § 507(a)(4) by arguing that priorities should be construed narrowly to achieve equality among all creditors. Section

507 itself manifests the policy that some classes of unsecured creditors should be paid before others. Thus, the true principle is not that *all* creditors should be treated equally, but that creditors *of equal priority* should receive pro rata shares of the debtor's property. To achieve equality within each class, priorities must be interpreted using ordinary principles of statutory construction, not narrowly construed to exclude some creditors whom Congress included.

Howard's approach also leads to interstate nonuniformity, administrative difficulties, and absurd results – none of which follow from the statute's plain meaning. On Howard's reading, contributions for the same benefits (*e.g.*, temporary disability insurance) by a multistate employer like Howard receive priority in States that do not mandate that benefit (*e.g.*, Pennsylvania), but not in States that do (*e.g.*, New York). Howard's reading would also force bankruptcy courts to decide whether a particular employee benefit was a "wage substitute" in States like New Jersey, where workers' compensation is formally elective but might be practically mandated. And Howard's position would have the perverse consequence of denying priority precisely when a State or the federal government deems a benefit so important that employers must provide it.

ERISA – enacted four years before § 507(a)(4) – also confirms that the natural meaning of "employee benefit plan" encompasses legally mandated workers' compensation insurance. ERISA's general definition of "employee benefit plan" indisputably includes mandatory workers' compensation. Moreover, the drafting history of § 507(a)(4) shows that Congress directly borrowed the phrase from ERISA because its natural meaning is a broad one.

Finally, enforcing § 507(a)(4) as written directly advances the core purpose for which Congress created the priority in the first place – protecting the financial integrity of

employee benefit plans. To be sure, Howard's employees will likely receive their benefits whether or not Zurich can claim the priority in this particular chapter 11 proceeding. But that is also true of many benefits provided by other plans that all agree are entitled to the priority, such as the multiemployer pension plans represented by amicus National Coordinating Committee of Multiemployer Plans ("NCCMP"), which must continue to pay benefits to employees of a defaulting employer with or without this priority. The language of § 507(a)(4) makes clear that eligibility for the priority does not turn on whether the moneys flow through directly to the debtor's employees; the priority applies to contributions to a plan, not payments to employees. It thus provides a measure of systemic protection for employee benefit plans rather than protection for the benefits of particular employees. In addition, § 507(a)(4) advances the Code's broader purpose of promoting the rehabilitation of insolvent debtors, because it gives insurers an incentive to continue coverage – without which an employer may not legally operate in most jurisdictions – even when the employer is facing insolvency.

The Fourth Circuit thus correctly adhered to the most natural reading of § 507(a)(4)'s text, as well as the reading that makes the most sense as a matter of logic and policy. That decision should be affirmed.

ARGUMENT

I. Zurich's Claim Qualifies for Priority Under the Plain Language of § 507(a)(4).

The meaning of the Bankruptcy Code, like other statutes, should be derived from the words Congress enacted into law. When the Code's "language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (quotation

marks omitted); *accord NextWave*, 537 U.S. at 307; *Ron Pair*, 489 U.S. at 242.

Section 507 of the Code specifies certain "expenses and claims" that "have priority" for payment. A "claim" is simply a "right to payment" from the bankruptcy debtor; its mirror-image is a "debt," or the debtor's "liability on a claim." 11 U.S.C. § 101(5)(A), (12). Accordingly, in giving priority to certain "claims," § 507 lists categories of unsecured debts for which the bankruptcy debtor is liable but that it has not paid, *e.g.*, debts for "alimony," "wages," various kinds of "tax[es]," or "contributions to an employee benefit plan." *Id.* § 507. Section 507 establishes the order in which these priorities are to be satisfied from the estate's assets, which is then given effect in other Code sections.[15]

Section 507(a)(4) grants fourth priority to "allowed unsecured claims for contributions to an employee benefit plan . . . arising from services rendered within 180 days before the date of filing of the [bankruptcy] petition." 11 U.S.C. § 507(a)(4). It stands in contrast to the next higher or third priority conferred by § 507(a)(3) on "claims . . . for . . . wages . . . earned by an individual." *Id.* § 507(a)(3).

It is clear from the text of § 507(a)(4) that Zurich is entitled to priority for the amounts Howard owes under its workers' compensation policies. First, workers' compensation is an "employee benefit." As indicated by its constituent words and by ordinary usage, "employee benefit" denotes a benefit (other than wages) that employers must provide to employees (or their dependents) by virtue of their status as employees. In the absence of a statutory definition,

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[15] *See, e.g.*, 11 U.S.C. § 726(a) (in Chapter 7 liquidation, estate assets shall first be distributed in order of § 507 priorities); *id.* § 1129(a)(9) (in Chapter 11 case, plan shall not be approved unless priority classes are paid in full or consent to different treatment).

"employee" is presumed to have its accumulated meaning under the law of agency. *See, e.g.*, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992). And "benefit" (another term undefined by the Code) has the ordinary meaning of "'something that guards, aids, or promotes well-being: advantage, good'; 'useful aid'; 'payment, gift [such as] financial help in time of sickness, old age, or unemployment'; or 'a cash payment or service provided for under an annuity, pension plan, or insurance policy.'" *Fischer v. United States*, 529 U.S. 667, 677 (2000) (quoting *Webster's Third New International Dictionary* 204 (1971)).

As its very name indicates, workers' compensation provides employees (workers) with benefits (compensation). Indeed, workers' compensation benefits are paradigmatic employee benefits. Benefits that an employer provides to its "workers with group life, health, and disability insurance through a master policy" are "employee benefit[s]" under § 507(a)(4). *In re Saco Local Dev. Corp.*, 711 F.2d 441, 448-49 (1st Cir. 1983). Exactly the same employee benefits are provided by workers' compensation, which pays a death benefit (life insurance) to the families of employees killed on the job; covers the medical costs (health insurance) for employees injured on the job; and provides income (disability insurance) for employees whose workplace injuries impair their earning ability. *See supra* at 7. And the nexus between workers' compensation and employment status is especially tight. Benefits are triggered by work-related injuries or occupational diseases, and thus are linked to the very conditions of employment.

It is equally clear that Howard's insurance policies with Zurich establish a "plan" for providing these benefits. In *Pegram v. Herdrich*, 530 U.S. 211 (2000), the Court observed that the "common understanding of the word 'plan'" is "a scheme decided upon in advance." *Id.* at 223

(citing *Webster's New International Dictionary* 1879 (2d ed. 1957)). Applying this ordinary meaning to an arrangement between an employer and an HMO, the Court explained:

> Here the scheme comprises a set of rules that define the rights of a beneficiary and provide for their enforcement. Rules governing collection of premiums, definition of benefits, submission of claims, and resolution of disagreements over entitlement to services are the sorts of provisions that constitute a plan. . . . [T]he agreement between an HMO and an employer who pays the premiums may, as here, provide elements of a plan by setting out rules under which beneficiaries will be entitled to care.

Id.; *see also Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987) (plan is "a set of standard procedures to guide processing of claims and disbursement of benefits"); *cf. Saco*, 711 F.2d at 448 (discussing "insurance plan").

Although *Pegram* was decided under ERISA, its reading of "plan" reflects the ordinary meaning of the word, rather than anything specific to that statute. *See* 530 U.S. at 223. It thus applies with equal force here because the term "plan" is not defined in the Bankruptcy Code and must therefore be given its ordinary meaning. *See Rousey v. Jacoway*, 125 S. Ct. 1561, 1566 (2005). The policies Zurich issued to Howard establish an "employee benefit plan," in that they embody a "scheme decided upon in advance" with rules governing the premiums that Howard must contribute to the plan, and the amounts and preconditions of the employee benefits that Zurich must pay to Howard's workers.

The amounts Howard owes under the workers' compensation policies are also plainly "contributions." In the employee benefit context, "contribution" means "a sum

paid by an employer" (or an employee) to a benefit plan or fund, including a sum paid to obtain insurance. *Webster's Third New International Dictionary* 496 (1993 ed.) (definition 4c of "contribution" as meaning "a sum paid by an employer to an unemployment or group-insurance fund or for retirement benefits for employees; *also* : a sum paid by employees under such a plan"). Thus, a "claim for contributions" given priority under § 507(a)(4) is simply the right to payment of such sums: the amount due from the debtor in order to help fund the plan for the provision of benefits to employees. The amounts due from Howard to Zurich for workers' compensation benefits coverage are precisely that.

Finally, Zurich's claim "aris[es] from services rendered within 180 days before the date of the filing of the [bankruptcy] petition." The statutory text does not specify *whose* services are intended, and it can be read as referring either to the services of the debtor's employees (as Howard contends) or of the claimant. It is not necessary to resolve that question here, because under either reading Zurich's claim "aris[es] from services rendered within 180 days." The phrase "arising from" is a broad one, requiring only that there be some kind of causal relationship between the services and the claim. *See, e.g., Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382-83 (2004). Judge King explained how Zurich's claim arises from the services rendered by Howard's employees during the requisite time: "It is only because workers were employed by Howard (and performing services to it) prior to the bankruptcy filing that Howard's obligation to provide insurance and pay the necessary premiums arises." Pet. App. 21a-22a. By the same token, the claim can be said to arise from Zurich's own services of providing coverage during the 180-day period. *See* J.A. 16a.

In sum, the statutory language is plain, and the Fourth Circuit correctly "enforce[d] it according to its terms" to grant Zurich a priority. *Lamie*, 540 U.S. at 534 (quotation marks omitted).

II. The Priority Created by Congress in § 507(a)(4) Is Not Limited to "Bargained-For Wage Substitutes."

Notwithstanding the statutory text, Howard contends that § 507(a)(4) does not apply here because Congress intended to grant a narrow priority only to "bargained-for . . . wage substitutes." Pet'rs Br. 34; *see also In re Birmingham-Nashville Express Inc.*, 224 F.3d 511 (6th Cir. 2000) (adopting "bargained-for wage substitute" restriction); *In re Southern Star Foods, Inc.*, 144 F.3d 712 (10th Cir. 1998) (same); *In re HLM Corp.*, 62 F.3d 224 (8th Cir. 1995) (same).[16]

Although Howard asserts that the plain meaning of § 507(a)(4) supports this restriction, its purported "textual" arguments have little if anything to do with the actual language of the statute. That is because the real origin of the "wage substitute" theory is not the language of § 507(a)(4), but the notion – which Howard purports to derive from the legislative history – that the provision was intended to do nothing more than "overrule" this Court's decisions in *Embassy Restaurant* and *Joint Industry Board*. *See Birmingham-Nashville*, 224 F.3d at 517 (deriving restriction

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[16] Howard's concept of a "bargained-for wage substitute" is quite unlike that in *Rousey*, in which the Court held that the exemption under 11 U.S.C. § 522(d)(11)(E) applies only if an asset "provide[s] income that substitutes for wages earned as salary or hourly compensation." 125 S. Ct. at 1569. The *Rousey* standard does not turn on whether a benefit is *bargained-for*, but on whether the stream of payments it provides replaces wage-earner income. The disability and death benefits provided by workers' compensation are substitutes for wages in the *Rousey* sense.

from legislative history); *Southern Star*, 144 F.3d at 715-16 (same); *HLM*, 62 F.3d at 225-26 (same).

The scope of § 507(a)(4) cannot be limited to "bargained-for wage substitutes." That limitation would be illogical, and the intent to impose it certainly may not be attributed to Congress in the absence of a textual basis that is utterly lacking here. Nor can the restriction be justified by resort to legislative history, both because doing so would be improper in the face of clear statutory text, *Union Bank*, 502 U.S. at 158; *Toibb*, 501 U.S. at 162, and because the legislative history does not support Howard in any event. In the end, Howard is forced to fall back on the contention that § 507(a)(4) should be "construed narrowly." But that plea cannot justify imposing an arbitrary limitation with no purchase in the language of the statute itself.

A. Nothing in the Text of the Code Supports the "Wage Substitute" Theory.

Howard's attempts to ground the "wage substitute" argument in the language of § 507(a)(4) are meritless.

"Employee benefit." Howard's brief offers no construction of the words "employee benefit" that would support excluding mandatory benefits, and the text simply will not support such a construction. Indeed, "the most significant feature" of § 507(a)(4) "that is relevant to this case is the absence of any language distinguishing between" bargained-for and mandatory employee benefits. *See Union Bank*, 502 U.S. at 155. The Court has recognized that legally mandated severance benefits are "employee benefits" under the identical language in ERISA. *Fort Halifax*, 482 U.S. at 3-4, 7; *see also Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470 (1997) (referring to "assessments" imposed by government "to cover employee benefits"). As a textual matter, the fact that state or federal law requires employers to provide a particular benefit is irrelevant.

Because the statutory language "employee benefit" encompasses legally mandated as well as bargained-for benefits, interpreting it as a synonym for bargained-for benefits is "mystifying." *See Patterson*, 504 U.S. at 766 (Scalia, J., concurring).

Nor would it make any sense to exclude mandatory benefits from § 507(a)(4). Several States mandate that employers provide *disability* benefits – a form of employee benefit that Howard concedes is entitled to priority under § 507(a)(4). Pet'rs Br. 8, 12, 22, 37. ERISA itself mandates that health plans cover some employee benefits, such as minimum hospital stays after childbirth (*see supra* at 12), that no one has ever suggested should be excluded from § 507(a)(4). And it is inconceivable that if Congress passed a law requiring all employers to provide health insurance for their employees (or authorizing States to do so), the resulting mandatory health coverage would cease to be an employee benefit within the ordinary meaning of § 507(a)(4).

Howard also contends that workers' compensation cannot be an "employee benefit" within the meaning of § 507(a)(4) because its benefits flow principally to employers. That is incorrect. The compensation paid to injured workers is clearly an employee benefit, even assuming that workers' compensation laws and insurance also benefit employers by abolishing potential tort liability and spreading risk. "That one beneficiary of an assistance program can be identified does not foreclose the existence of others." *Fischer*, 529 U.S. at 677-78. Moreover, it can hardly be disputed that "the primary purpose of [workers' compensation laws] is to benefit the worker." *Griffin*, 663 N.W.2d at 865.[17]

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[17] *Accord, e.g., Eversman*, 614 N.W.2d at 864; *Keith v. Hopple Plastics*, 178 S.W.3d 463, 466 (Ky. 2005); *Sylvester v. Indus. Comm'n*, 756 N.E.2d 822, 827 (Ill. 2001); *Kroger Co. v. Keng*, 23 S.W.3d 347, 349

By the same token, employees derive advantages from workers' compensation *insurance* – even if employers do too. Insurance ensures that injured employees receive their workers' compensation benefits even if their employer becomes insolvent or otherwise defaults. States require employers to obtain workers' compensation insurance (or to qualify to self-insure) and penalize employers who fail to do so precisely because insurance is primarily for the benefit of employees. *See, e.g.*, N.J. Stat. Ann. § 34:15-83 ("Every contract of [workers' compensation] insurance . . . is made for the benefit of the several employees of the insured employer and their dependents"). No such legal coercion would be needed if the insurance were only for the benefit of the employer.[18]

Howard has thus failed to identify any plausible basis for excluding Zurich's claim from § 507(a)(4) on the ground that state-mandated workers' compensation is not an "employee benefit."[19]

(Tex. 2000); Arthur B. Honnold, *Theory of Workmen's Compensation*, 3 Cornell L.Q. 264 (1917-1918).

[18] Even if employees did not benefit from the insurance as such, the health, disability, and death benefits provided by workers' compensation itself would still be employee benefits. Howard's argument confuses *employee benefits* with the *plan* that provides them.

[19] Howard also asserts that there was a specific priority for workers' compensation from 1934 to 1938 and that the Court should infer therefrom that workers' compensation is not covered by § 507(a)(4) because it is not specifically mentioned now. Pet'rs Br. 19-20. That is incorrect on all fronts. Legislation in 1934 made claims for workers' compensation awards "provable" and allowed them "the priority provided for in clause (7)" of the priority statute, which at the time gave claims whatever priority they were entitled to under state law. Act of June 7, 1934, Pub. L. No. 73-296, 48 Stat. 923-24 (1934); *Missouri v. Ross*, 299 U.S. 72, 73 & n.1 (1936). In 1938, Congress excised the state-law priority on the ground that priorities should be governed by purely federal standards. H.R. Rep. No. 75-1409, at 9, 15, 89 (1937). Thus, neither the

"Contributions." Howard is equally unpersuasive in contending that the statutory term "contributions" only encompasses payments for "wage substitutes." Ignoring the obviously applicable dictionary definition, *supra* at 20-21, Howard latches on to two inapposite meanings of the word.[20]

First, based on the meaning of "contribution" in the context of charitable giving, *see Webster's Third* 496 (definition 3a), Howard suggests that a § 507(a)(4) "contribution" must be voluntary. But most meanings of "contribution" do not connote voluntariness. In fact, the original meaning of the word is "a payment imposed upon a body of persons" – the very opposite of a voluntary payment. *Id.* (definition 1). The concept of "mandatory contributions" – which would be an oxymoron if "contributions" were necessarily voluntary – appears repeatedly in this Court's cases. *E.g.*, *United States v. Lee*, 455 U.S. 252, 258 (1982) ("mandatory contributions" to social security); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2696 (2005) (it is "mandatory" for carriers to "contribute" to universal service fund).[21] Moreover, even when bargained for, employee benefits are rarely if ever

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priority nor its elimination was specific to workers' compensation. In any event, when Congress enacted a general priority for *all* employee benefit plan contributions in 1978, there was no need to single out workers' compensation for special mention.

[20] Howard inaccurately suggests that *Webster's Third*'s definitions of "contribute" and "contribution" changed after § 507(a)(4) was enacted. Pet'rs Br. 11-12. In fact, the definitions have not changed at all. *Compare Webster's Third New International Dictionary* 496 (1976 ed.) (defining "contribute" and "contribution"), *with id.* at 496 (1981 ed.) (identical definitions), *with id.* at 496 (1993 ed.) (identical definitions).

[21] Similarly, a federal advisory commission proposed funding retiree health benefits for coal miners through "'a *statutory obligation to contribute* to [certain employee benefit] plans'" – a proposal that was eventually enacted into law. *Eastern Enters.*, 524 U.S. at 512 (quoting advisory commission) (emphasis added).

voluntary in the sense of the definition Howard invokes relating to charities. *See Saco*, 711 F.2d at 449; *Sheet Metal Workers Local 19 v. Keystone Heating & Air Conditioning*, 934 F.2d 35, 37 (3d Cir. 1991) (describing "collective bargaining agreement that required the company to make contributions to employee benefit funds"). Such benefits are mandated by economic reality, even if not by law. If Congress's use of "contribution" limited § 507(a)(4) to philanthropy, it would cover almost nothing.

Second, Howard points to the definition of "contribute" as "to give or grant something in common with others," and suggests that "contributions" count under § 507(a)(4) only when there are multiple contributors to a joint fund. Pet'rs Br. 12 (quoting *Webster's Third*). That cannot possibly be correct because a bargained-for benefit plan may have only one contributor, just as a mandatory plan may have many. The meaning of "contribution" in the employee benefit context refers to *any* sum paid by an employer to a plan – whether or not it is to a joint fund. *See supra* at 20-21; *Mead Corp. v. Tilley*, 490 U.S. 714, 718-19 (1989) (describing "a single-employer defined benefit plan" that "was funded entirely by [the employer's] contributions"); *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 607 (1993) (referring to "contributors to . . . single-member . . . plans"); *Saco*, 711 F.2d at 448-49. Congress did not intend to limit § 507(a)(4) to contributions to multiemployer plans, while denying priority to single-employer plans.

"Arising from services rendered within 180 days." The "services rendered" language of § 507(a)(4) likewise lends no support to Howard's position. Throughout its brief, Howard truncates the statutory language to omit the words "within 180 days," thereby suggesting that Congress intended the phrase "services rendered" to narrow the

substantive scope of the priority. *See, e.g.*, Pet'rs Br. i, 28-29. But the point of the statutory language is obviously to impose a temporal limit: only claims arising from services rendered *within 180 days before bankruptcy* qualify for the priority.

Beyond this misleading truncation, Howard offers no explanation why its reading of "services rendered" would exclude Zurich's claim. Even if the debtor's obligation to make contributions must arise from its employees' services during the 180-day period, that in no way requires that the contributions must be wages or "bargained-for wage substitutes." Howard suggests in passing that Zurich's claim arises not from the services of Howard's employees, but rather from "the employer's default in payment to the insurance company." *Id.* at 8. But a default precedes *every* claim for contributions that a debtor has failed to pay. Thus, on Howard's reading, *no* claim would ever be entitled to priority. "[A]rising from" must refer to the events that give rise to the right to payment in the first place, regardless of default. *See* 11 U.S.C. § 101(5)(A), (12) ("claim" is a "right to payment" based on a "debt").[22]

Statutory context. Finally, there is no merit to Howard's contention that the statutory "context" limits § 507(a)(4) to "wage substitutes." Howard focuses on the relationship between § 507(a)(4) and the priority for wages in § 507(a)(3). But the stark contrast between the language of these separate priorities makes clear that § 507(a)(4) is *not* intended as a priority for compensation earned by and paid to

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[22] As noted *supra*, at 21, it is not necessary to decide *whose* services this language references. Nonetheless, Howard's argument that reading "services rendered" to refer to the services of the claimant would "lead to illogical phraseology," Pet'rs Br. 29, is based on misreading a different statutory term – "contribution" – to refer to a contribution by the insurer, rather than the payment that the *debtor* is obligated to make to the plan.

employees, because it expressly confers the priority on claims for payments "to an employee benefit plan." *Compare* 11 U.S.C. § 507(a)(3) (giving third priority to "claims . . . for . . . wages . . . earned by an individual"), *with id.* § 507(a)(4) (giving fourth priority to "claims for contributions to an employee benefit plan").[23] Ignoring that express distinction between the scope of the two subsections, Howard argues that the priority for "contributions to an employee benefit plan" must implicitly be limited to "wage substitutes" merely because it is subject to the same dollar cap as the wage priority. *See* 11 U.S.C. § 507(a)(4)(B).

That is an insupportable leap. The common cap on the *amount* of the claims entitled to priority under § 507(a)(3) and § 507(a)(4) cannot dictate the *nature* of the claims entitled to priority under the plain language of those provisions. The shared cap simply reflects a compromise that Congress struck between competing types of priority claims when it inserted the new priority for employee benefit plan contributions into the existing hierarchy. Congress provided that wage claims shall be paid first, up to the amount of the cap, so that the new benefit priority would not impair the wage priority. *Cf. Embassy Rest.*, 359 U.S. at 33-34 (observing that if employee benefit plan contributions were granted the same priority as wages, it could reduce the employee's own recovery). Congress also extended the same cap to the priority for employee benefit plan contributions so that claims with *lower* (or no) priority would not be prejudiced by insertion of the new § 507(a)(4) priority above

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[23] NCCMP thus distorts the § 507(a)(4) priority by arguing that Zurich is improperly claiming priority as the subrogee of Howard's employees. *See* NCCMP Br. 15 n.12. That argument would work only if the priority belonged to the employees. But the plain language of § 507(a)(4) makes clear that the priority applies to contributions to a plan, not payments to employees. Hence, Zurich need not step into the shoes of the employees as their subrogee to qualify for the priority.

them. Nothing in this elegant compromise limits the *kinds* of contributions to employee benefit plans that receive priority under the clear language of § 507(a)(4).[24]

Equally meritless is Howard's contention that Zurich cannot claim priority under § 507(a)(4) because state workers' compensation funds are purportedly entitled only to the lower priority for excise taxes under § 507(a)(8)(E). This argument simply assumes that state insurance funds are not entitled to the § 507(a)(4) priority. In fact, to the extent that a state fund underwrites workers' compensation insurance policies, it would be entitled to the priority for "contributions to an employee benefit plan" for the same reasons Zurich is. Nothing about the fact that the insurance is underwritten by the State would relegate it to a lower priority, as Howard assumes. Indeed, the only case we are aware of that denied the § 507(a)(4) priority to a state-administered workers' compensation underwriter is *In re Southern Star Foods, Inc.*, 144 F.3d 712 (10th Cir. 1998) But that case did not turn on the fact that the fund was state-administered. Rather, it applied the same erroneous "wage substitute" theory that Howard urges here. *See id.* at 715-16. As that theory is wrong, *Southern Star*'s denial of the § 507(a)(4) priority to the state-administered fund was also in error.[25]

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[24] Similarly, the scope of the wage priority is not altered by the fact that it shares the common cap with the benefit priority. On Howard's logic, the shared cap should limit the § 507(a)(3) wage priority to "employee benefit plan substitutes," which would exclude the minimum wage and mandatory overtime because they cannot be bargained away for greater employee benefits. That is obviously absurd, and so is the mirror-image limitation Howard would impose on § 507(a)(4).

[25] Howard cites cases in which state funds have claimed the excise tax priority under § 507(a)(8)(E), but those cases do not support the negative inference that state insurers are not entitled to priority under § 507(a)(4) – a question that the excise tax cases do not address. Where estate assets are sufficient to cover all priority claims but not all nonpriority claims (as

B. The Legislative History Does Not Limit § 507(a)(4) to "Wage Substitutes."

Because Zurich is entitled to a priority under the plain text of § 507(a)(4), the "sole function of the courts . . . is to enforce it according to its terms." *Lamie*, 540 U.S. at 534 (quotation marks omitted). To overcome that text, Howard would have to show that it would be "absurd" for the § 507(a)(4) priority to encompass Zurich's claim, *id.*, or, at the very least, that doing so would be "demonstrably at odds with the intentions" of Congress, *Ron Pair*, 489 U.S. at 242 (quotation marks omitted). Under either standard, Howard's reliance on snippets of legislative history cannot meet the "exceptionally heavy" burden of showing that Congress did not mean what it said in § 507(a)(4). *See Union Bank*, 502 U.S. at 155-56. Not one word in the legislative history expresses an intent by anyone to exclude workers' compensation benefits from the scope of the priority. To the contrary, the legislative history shows that Congress chose the words "employee benefit plan" precisely because of their breadth, in order to sweep in all forms of employee benefits. *See infra* at 41-42.[26]

Lacking any affirmative evidence in the legislative history, Howard contends that its restrictive interpretation of § 507(a)(4) should be inferred from the fact that the provision was designed to overrule *Embassy Restaurant* and *Joint*

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frequently occurs), state funds have a very strong incentive to seek priority under § 507(a)(8)(E) in addition to or instead of § 507(a)(4), for two reasons: claims under § 507(a)(8)(E) are not subject to any dollar cap, and they reach back three years, instead of merely 180 days.

[26] Indeed, at least one union witness testifying in support of § 507(a)(4) specifically noted workers' compensation as a common form of benefit. *Bankruptcy Reform Act: Hearings on S. 235 and S. 236 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 94th Cong., 268-69 (Apr. 17, 1975) (statement of Jeffrey Gibbs, AFL-CIO) ("*Hearings on S. 235 and S. 236*").

Industry Board, which concerned "fringe benefits" other than workers' compensation. Pet'rs Br. 8-9, 33-34; *see also, e.g., Birmingham-Nashville*, 224 F.3d at 517. That argument fails on its own terms. Congress did not truly "overrule" those cases – as it could have by, for example, redefining the word "wages" in § 507(a)(3) to include a specific list of "wage substitutes." To the contrary, Congress accepted the Court's holding that the wage priority in § 507(a)(3) does not extend to the benefit plan contributions at issue in those cases, and then created an *entirely new* priority for contributions to employee benefit plans in § 507(a)(4) that neither refers to wages nor requires that employees hold the claim for the priority to apply. The legislative history simply never suggests that Congress sought to limit the newly created priority to "bargained-for wage substitutes." Thus, while *Embassy Restaurants* and *Joint Board* may have "catalyzed the enactment of" § 507(a)(4), they cannot be said to "define the outer limits of the statute's coverage." *New York v. FERC*, 535 U.S. 1, 21 (2002).

Howard also points to portions of the legislative history indicating that Congress was principally concerned with "collective bargaining" and "labor contract negotiations." Pet'rs Br. 34. But this proves far too much. Howard concedes that § 507(a)(4) is not limited to union plans or those that result from collective bargaining. Pet'rs Br. 21; *see also Saco*, 711 F.2d at 448-49. Indeed, it could hardly do otherwise. The passages Howard quotes are simply additional examples of plans that Congress wished to include within the scope of the statute – not statements marking the outer boundaries of the statute's coverage.

In these critical respects, Howard's statutory construction argument is exactly like arguments this Court has consistently found wanting. The reality is that "statutory prohibitions often go beyond the principal evil [Congress

was concerned with] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); *see also PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001) (that "statute can be applied in situations not expressly anticipated by Congress" indicates "breadth" of language that Congress chose).

The Court has been particularly adamant in its refusal to narrow the operative scope of Bankruptcy Code provisions based on supposed congressional intent reflected in the legislative history. *E.g.*, *Patterson*, 504 U.S. at 762 (rejecting argument that "applicable nonbankruptcy law" in § 541 excluded federal nonbankruptcy law); *Union Bank*, 502 U.S. at 157-58 (rejecting argument that payments in "ordinary course of business" under § 547(c)(2) excluded ordinary-course payments on long-term debt); *Toibb*, 501 U.S. at 161-62 (rejecting argument that "person" in § 109(d) excluded individuals); *Ron Pair*, 489 U.S. at 242-49 (rejecting argument that "secured claim" in § 506(b) excluded claims secured by nonconsensual liens). As in *Patterson*, the legislative history here "reflect[s] at best congressional intent to *include* [bargained-for benefits] within the meaning of '[employee benefits].' By no means do[es it] provide a sufficient basis for concluding, in derogation of the statute's clear language, that Congress intended to *exclude* other [benefits] from the provision's scope." 504 U.S. at 762 (emphasis added).

Indeed, to the extent Congress enacted § 507(a)(4) to ensure that employers live up to all the obligations they assume by hiring employees, that concern requires payment of mandatory as well as bargained-for employee benefit plan contributions. Just as workers are promised legally mandated minimum wages and overtime in addition to any wages they

may bargain for, so they are promised mandatory contributions to employee benefit plans in addition to bargained-for contributions. And just as the legally mandated wage amounts receive a § 507(a)(3) priority, contributions to legally mandated employee benefit plans receive a § 507(a)(4) priority.

In any event, even when mandatory, workers' compensation coverage substitutes for wages just like any other employee benefit does. When employers cover the cost of this benefit, employees do not need to spend their wages to obtain insurance against the financial hardships caused by industrial accidents. As the Court observed in 1917, "just as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer . . . under the new [workers' compensation] system, presumably will be reflected in the wage scale." *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 201-02 (1917). Substantial empirical evidence bears that prediction out: the cost to the employer of mandatory workers' compensation is reflected in lower wages.[27]

C. The "Wage Substitute" Theory Would Lead to Irrational Results with No Textual Basis.

Howard's "bargained-for wage substitute" theory also leads to irrational results and unnecessary problems of administration. On Howard's theory, contributions for exactly the same employee benefits receive priority in some

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[27] *See, e.g.*, Price V. Fishback & Shawn Everett Kantor, *Did Workers Pay for the Passage of Workers' Compensation Laws?*, 110 Q.J. Econ. 713 (1995); Jonathan Gruber & Alan B. Krueger, *The Incidence of Mandated Employer-Provided Insurance*, 5 Tax Policy & Econ. 111, 126-34, 139 (1991); W. Kip Viscusi & Michael J. Moore, *Workers' Compensation: Wage Effects, Benefit Inadequacies, and the Value of Health Losses*, 69 Rev. Econ. & Stat. 249 (1987).

States (*e.g.*, Texas, where workers' compensation is optional) but not in others (*e.g.*, Oklahoma, where it is mandatory). Even within a single State, the priority would apply to workers' compensation coverage for some employers who may elect it (*e.g.*, employers in Tennessee with five employees), but not for others for whom it is mandatory (*e.g.*, employers in Tennessee with six employees). *Supra* at 9-10. Similarly, temporary disability premiums paid by Howard would be entitled to priority for covered employees in Pennsylvania, where disability insurance is not mandated, but not for those across the border in New York and New Jersey, where it is. *Supra* at 11.

As the examples show, Howard's reading would mean that contributions for the very same benefits are entitled to priority only when the legislature thinks the benefits are *not* important enough to be mandatory. Under this theory, the cost of providing the few kinds of benefits mandated by Congress in ERISA, such as minimum hospital stays for childbirth, would also be excluded from the priority, even though those costs are plainly "contributions to an employee benefit plan." There is simply no reason to think Congress would have intended such perverse results.

The "wage substitute" theory would also embroil bankruptcy courts in difficult questions concerning whether a particular benefit is mandatory in a given jurisdiction. Courts would have to decide, for example, whether Howard's payments for workers' compensation coverage in New Jersey, where "[t]echnically coverage is elective, but practically compulsory," *supra* at 10, are entitled to priority. Other difficult questions would arise when one employee benefit plan covers employees in States where particular benefits (such as temporary disability benefits) are mandatory and also covers employees in other States where those benefits are optional. Courts would then be faced with

the task of ascertaining how much of an employer's unpaid contribution should be subject to a priority claim and how much should not. Nothing in § 507(a)(4) remotely suggests that Congress intended the priority for contributions to employee benefit plans to turn on such questions.

D. Petitioners Cannot Override § 507(a)(4)'s Language with an Arbitrary "Narrow Construction."

Lacking any other argument, Howard falls back on the general contention that bankruptcy priorities must be construed narrowly to preserve the Code's philosophy of equality among creditors. Pet'rs Br. 10-11, 14.

This argument is based on a faulty premise. The Code's philosophy is not equality among all creditors, regardless of their circumstances – if it were, then there would be no priorities at all. Rather, the very provision of the Code at issue here establishes a hierarchy under which some creditors are paid *before* other creditors. Thus, the operative principle is actually that creditors "*of equal priority* should receive pro rata shares of the debtor's property." *Begier v. IRS*, 496 U.S. 53, 58 (1990) (emphasis added); *see also SBA v. McClellan*, 364 U.S. 446, 452-53 (1960) ("policy of equality of distribution for *similar* creditors") (emphasis added); *Missouri v. Ross*, 299 U.S. 72, 74-75 (1936); *Shropshire, Woodliff & Co. v. Bush*, 204 U.S. 186, 189 (1907); 11 U.S.C. §§ 726(a)-(b), 1123(a)(4).

In light of this principle, it does not make sense to interpret the priority provision especially narrowly or especially broadly – it makes sense to give the priority the scope Congress intended based on the words Congress used. *Cf. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 10 (2000) (explaining that a canon "is a tool of construction, not an extratextual supplement"); *United States v. Noland*, 517 U.S. 535, 540-43 (1996) (refusing to

permit use of equitable subordination to disturb policy judgments Congress made in the priority statute). Indeed, arbitrarily narrowing the reach of § 507(a)(4) to deny priority to one kind of employee benefit plan while giving priority to others would defeat the true principle of equality among creditors "of equal priority."

For this reason, the Court has long applied traditional interpretive tools, particularly ordinary language analysis, to the priority provisions of the Code. *See, e.g.*, *Shropshire*, 204 U.S. at 189 (examining "the plain words of" the wage priority provision and "find[ing] no warrant for supplying . . . a restriction" rendering assignees of wages ineligible for the priority); *City of Lincoln v. Ricketts*, 297 U.S. 373, 376 (1936) (construing priority statute and stating that "we seek the legislative intent," and "give to the words their natural significance unless that leads to an unreasonable result plainly at variance with the evident purpose of the legislation"); *Lewis v. United States*, 92 U.S. 618, 623 (1875) (interpreting priority provisions and stating that "[n]either statute contains any qualification, and we can interpolate none. Our duty is to execute the law as we find it"); *see also Patterson*, 504 U.S. at 763-64 (plain language of the Code overrides general bankruptcy policy). It is true that in a handful of cases – including, ironically, the very cases that Congress superseded when it enacted § 507(a)(4) – this Court has stated generally that the priority statute must be interpreted in light of the bankruptcy law's "theme of equality of distribution." *Nathanson v. NLRB*, 344 U.S. 25, 29 (1952), *cited in Embassy Rest.*, 359 U.S. at 31. But even those occasional statements do not suggest that creditors given priority by Congress should be reduced to "equality" with creditors to whom Congress did not grant priority. *See Nathanson*, 344 U.S. at 29 (refusing to distinguish between two different groups of "wage claimants"); *Joint Indus. Bd.*, 391 U.S. at 228 (noting that in spite of "the general policy of

the Bankruptcy Act to distribute assets of the estate equally to creditors," there is a statutory priority afforded to wages).

In the end, Howard offers nothing more than an arbitrary limitation on § 507(a)(4) based on inconsistent and unsupported policy arguments untethered from the provision's text. These arguments flout the rule that Congress knows how to make exceptions to general terms in the Bankruptcy Code when it intends to do so. *See, e.g., Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990) ("Congress defined 'debt' broadly and took care to except particular debts from discharge where policy considerations so warranted"); *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985) (Congress knows how to limit application of a bankruptcy provision when it wants to).

In this case, as in all other cases interpreting the Bankruptcy Code, this Court's role is to give effect to Congress's intent as evinced by the words in the statute. As demonstrated above, those words entitle Zurich to priority payment of Howard's unpaid workers' compensation debts for the period specified in § 507(a)(4).

III. ERISA Confirms That the Ordinary Meaning of § 507(a)(4)'s Language Includes Payments for Workers' Compensation Insurance.

ERISA – enacted only four years before § 507(a)(4) – confirms that the ordinary meaning of "employee benefit plan" encompasses insurance to provide workers' compensation benefits. ERISA identifies "employee welfare benefit plans" as one of two main types of "employee benefit plans" (the other being "employee pension benefit plans"). 29 U.S.C. § 1002(3). An "employee welfare benefit plan" is, in turn, defined as:

> any plan, fund, or program . . . established or maintained by an employer or by an employee

> organization, or by both, to the extent [it] was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeships or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any [non-pension] benefit described in section 186(c) of this title [§ 302 of the Taft-Hartley Labor Management Relations Act].

Id. § 1002(1).

Workers' compensation insurance is encompassed within both alternative (A) and alternative (B) of this definition. Workers' compensation insurance provides a "plan . . . or program . . . established [and] maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance . . . , medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment." *Id.* § 1002(1)(A). Workers' compensation insurance also provides non-pension "benefit[s] described in section 186(c) of this title," *id.* § 1002(1)(B), which expressly encompasses benefits "for injuries or illness resulting from occupational activity or insurance to provide . . . the foregoing" – *i.e.*, workers' compensation insurance. *Id.* § 186(c)(5)(A).[28]

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[28] ERISA's incorporation of § 186(c) carefully specifies that it encompasses all "benefits *described* in section 186(c)" – not just such benefits when they are provided by union trusts under § 186(c). *See Mass. v. Morash*, 490 U.S. 107, 114 n.9 (1989) (Congress was concerned

Confirming that workers' compensation insurance comes within the concept of an employee benefit plan, ERISA's operative provisions and preemption clause expressly exempt "any employee benefit plan if . . . such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws." *Id.* § 1003(a), (b)(3); *see also id.* § 1144(a) (creating the same exception to preemption of state laws that "relate to any employee benefit plan"). This express exemption drives home that the ordinary meaning of "employee benefit plan" encompasses workers' compensation insurance mandated by state law, and that Congress knows how to carve mandatory workers' compensation insurance out of the coverage of a federal law relating to employee benefit plans when it intends to do so.[29] No such express exemption appears in § 507(a)(4) of the Bankruptcy Code – because none is intended.

Howard misses the point when it argues that the Court should not adopt a technical definition of "employee benefit plan" from a different statute with a different purpose when construing the same language in § 507(a)(4). Contrary to Howard's assumption, the meaning of "employee benefit plan" in ERISA is not derived from a technical definition tailored to a purpose peculiar to that statute, but reflects the ordinary and natural meaning of the phrase. *See, e.g.*, *Pegram*, 530 U.S at 222-23; *Darden*, 503 U.S. at 323. ERISA first defines "employee benefit plan" in a general way that reflects its ordinary meaning and includes workers'

"with assuring that all benefits covered by section 186(c) were also covered by section 1002(1)") (quotation marks omitted).

[29] *See also Dist. of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 131 (1992) (referring to "ERISA-exempt workers' compensation plans"); *Combined Mgmt., Inc. v. Superintendent of Bureau of Ins.*, 22 F.3d 1, 3-6 (1st Cir. 1994); *Employee Staffing Servs., Inc. v. Aubry*, 20 F.3d 1038, 1040-42 (9th Cir. 1994); *cf.* 28 U.S.C. § 1445(c) (forbidding removal of state workers' compensation cases to federal court).

compensation insurance. Only thereafter does ERISA narrow the concept in order to demarcate the subset of "employee benefit plans" – expressly excluding state-mandated workers' compensation plans – that are covered by ERISA's operative provisions and preemption clause. ERISA draws that distinction between the two kinds of employee benefit plans to achieve a purpose specific to ERISA: distinguishing between the employee benefit plans that are governed exclusively by federal law, and those like workers' compensation that States may regulate in order to mandate benefits. Thus, it is the *exclusion* of workers' compensation plans that reflects a narrowing of the ordinary meaning of "employee benefit plan" tailored to ERISA's specific purpose of demarcating federal from state jurisdiction. *That* purpose is indeed irrelevant to § 507(a)(4), which by its terms applies to all employee benefit plans, whether regulated by federal or state law. Yet Howard asks the Court to read the resulting exclusion of workers' compensation into the Bankruptcy Code provision.[30]

The drafting history of § 507(a)(4) also confirms that "employee benefit plan" has the same ordinary meaning in that provision as in the general definition in ERISA. The original draft of § 507(a)(4) gave priority to "pension, insurance, or similar employee benefit plans." *See* S. 235,

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[30] NCCMP's reliance on the Davis-Bacon Act (NCCMP Br. 28-29) is misplaced for essentially the same reason: Davis-Bacon further demonstrates that mandatory benefits are included in the ordinary meaning of employee or fringe benefits unless expressly excluded. Its formula for calculating the prevailing wage includes "fringe benefits" – "but only where the contractor . . . is not required by other federal [or] state . . . law to provide . . . those benefits." 40 U.S.C. § 3141(2)(B). By expressly excluding "required" or mandatory benefits, the Davis-Bacon Act indicates that such benefits are normally *included* in the concept of "fringe benefits" absent such exclusion – as in § 507(a)(4).

94th Cong. § 4-405(a)(4) (1975). That original language already encompassed workers' compensation insurance, but labor representatives urged Congress to adopt the even broader phrase "employee benefit plan" from ERISA – which had recently been enacted – to guarantee "federal bankruptcy law protection now and in the future of *all employee benefit plans*." *Hearings on S. 235 and 236*, *supra* note 26, at 259 (statement of Max Zimny, AFL-CIO) (emphasis added); *see also id.* (testifying that priority should extend to full range of benefits included within Taft-Hartley Act § 302(c), 29 U.S.C. § 186(c) – which, as explained *supra* at 39, includes workers' compensation insurance). Congress then amended the proposed legislation, replacing its earlier formulation with the even broader term "employee benefit plans." *See Bankruptcy Reform Act of 1978: Hearings on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 95th Cong. 936 (Dec. 1, 1977) (statement of Max Zimny, AFL-CIO) (stating that under amended bill "[t]he protected status would extend to all employee benefit plans, the same broad, inclusive language contained in [ERISA]"). There can be little doubt, then, that the language means the same thing in both ERISA and the Bankruptcy Code, and includes workers' compensation insurance.

The 2005 amendments to other Code sections also confirm that in the absence of limiting language, the phrase "employee benefit plan" is intended to have the ordinary meaning captured by ERISA's general definition. For example, amended § 541 uses the term "employee benefit plan," but expressly *narrows* it in a way that excludes workers' compensation plans. The section as amended excludes from the "property of the estate" amounts withheld by an employer from employees' wages, or received by an employer from employees, "as contributions . . . to . . . an employee benefit plan *that is subject to* title I of [ERISA]."

11 U.S.C. § 541(b)(7)(A)(i)(I), (b)(7)(B)(i)(I) (as amended 2005) (emphasis added). While workers' compensation plans fall within the ERISA definition of "employee benefit plan," they are expressly excluded from the scope of title I's coverage, and Congress incorporated this exclusion in amended § 541. This demonstrates that Congress knows how to incorporate the exclusion of workers' compensation from ERISA's operative provisions into § 507(a)(4) if it wants to do so. Section 507(a)(4), of course, has no such textual limit. *See also id.* § 724(f)(2) (as amended 2005) (cross-referencing § 507(a)(4) without limiting scope of "employee benefit plan"). Where Congress has stated a limitation in one section but not another, the limitation may not be read into the section where Congress omitted it. *E.g.*, *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

In contrast, no inference can be drawn from cross-references in other amended Code sections to an "administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan." 11 U.S.C. § 704(a)(11) (as amended 2005); *see id.* §§ 521(a)(7), 1106(a)(1) (as amended 2005). Those cross-references to ERISA's definition of "administrator" are necessary because "administrator" – unlike "employee benefit plan" – has a multi-tiered technical meaning under ERISA.[31] Because ERISA's general definition of "employee benefit plan" reflects its ordinary meaning, no cross-reference is needed unless Congress intends a *narrower*

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[31] *See* 29 U.S.C. § 1002(16)(A) ("The term 'administrator' means – (i) the person specifically so designated by the terms of the instrument under which the plan is operated; (ii) if an administrator is not so designated, the plan sponsor [as defined at length in § 1002(16)(B)]; or (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe").

definition of that term, as in amended § 541's exclusions from property of the estate.[32]

IV. Applying the Priority According to Its Terms to Cover Zurich's Claim Effectuates the Purposes of the Statute.

Applying the language of § 507(a)(4) according to its terms also effectuates a number of statutory purposes.

A. The Priority Protects the Long-Term Financial Health of the Employee Benefits System.

Giving priority to the debtor's obligations to make contributions to employee benefit plans – including payments due for workers' compensation coverage – protects the health of the employee benefits system. As a class, employees are certainly the *ultimate* beneficiaries of that protection for employee benefit plans. But the amounts entitled to priority under § 507(a)(4) do not, by and large, pass directly through to the debtor's own employees. Rather, by requiring bankrupt employers to pay their fair share for funding employee benefits and thereby strengthening the financial integrity of our employee benefits system, § 507(a)(4) indirectly benefits employees in the aggregate and over time.

This legislative purpose is directly advanced by giving priority to amounts due for workers' compensation insurance. If bankrupt employers do not pay the amounts they owe for insuring the payment of workers' compensation benefits to their employees, the shortfall will ultimately be reflected in

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[32] Howard suggests (Pet'rs Br. 17) that Congress's failure in 2005 to clarify the scope of "employee benefit plan" under § 507(a)(4) somehow endorsed the narrow reading of the section that several courts had then adopted. But other courts had construed the section to include workers' compensation insurance. *E.g.*, *Employers' Ins. of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605 (9th Cir. 1993). Thus, Congress's failure to clarify hardly endorsed Howard's side of this split.

higher premiums for other employers. In extreme cases, cumulative shortfalls could undermine the financial stability of the insurer itself, creating uncertainty whether injured employees will receive the benefits to which they are entitled. When that occurs, injured workers must turn to state back-up funds for payment of the benefits they have been promised – but those state funds can be depleted by massive claims. *See* Green, *supra*, at 53 (describing "cash crunch" on state workers' compensation insurance guaranty funds caused by insolvent insurers). Giving a priority to amounts due for workers' compensation insurance protects the financial health of the system that States (and Congress in the LHWCA) created to guarantee this most important employee benefit.

It is, of course, correct that as to injuries suffered while the insurance remains in effect the insurer will pay benefits – for years or even decades in some cases – notwithstanding the employer's default. The very reason States require workers' compensation insurance is to secure the payment of benefits in this way. But nothing in § 507(a)(4) limits the priority to claims for contributions that will pass through to the debtor's own employees.

Indeed, it is particularly disingenuous for amicus NCCMP to argue otherwise, because multiemployer pension plans are exactly analogous to workers' compensation insurance in this respect. As this Court has recognized, "[a] multiemployer plan has features of an insurance scheme in which employers spread the risk that their employees will meet the plan's vesting requirements and obtain an entitlement to benefits." *Concrete Pipe & Prods.*, 508 U.S. at 638-39. Numerous employers pay contributions into a multiemployer plan's trust, and the plan is obligated to pay promised benefits to employees *even if their employer defaults* on its contributions; the plan makes up for the

shortfall by increasing the contributions of the other employers so that all vested benefits are paid. *See supra* at 13.[33] The PBGC also insures the payment of minimum benefits by all pension plans, including single-employer plans. *See supra* at 13-14. Just as in the workers' compensation context, multiemployer plans provide multiple safety nets to assure the payment of benefits to employees, regardless of whether the § 507(a)(4) priority applies.[34]

At bottom, then, Howard's policy argument for denying the priority for workers' compensation insurance while granting it to multiemployer pension trusts rests on mischaracterizations of both kinds of employee benefit plans. Howard misleadingly suggests that without the priority for the multiemployer pension plans, Howard's employees will not receive the pensions they were promised, when in fact the entire purpose of the multiemployer trust is to secure the pension benefits notwithstanding default by an employer. Howard also misleadingly argues that the only purpose of workers' compensation insurance is to manage the employers' risk, when in fact the insurance has precisely the same function of securing the payment of benefits for employees as a pension trust has. Indeed, ERISA recognizes this parity of function, in that it requires (with minor exceptions not relevant here) that all employee benefit plan

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[33] Some multiemployer welfare benefit plans also guarantee benefits to employees even if their employer becomes insolvent and cannot pay its contributions to the plan. *See supra* note 14.

[34] For example, the Central States Fund, one of the plans covering Howard's employees and claiming priority in this bankruptcy case, has thousands of contributing employers and billions of dollars in assets. *See supra* note 13. For Central States, just as for a workers' compensation insurer, the priority serves to protect the long-range financial integrity of the employee benefit system by requiring the bankrupt employer to pay its fair share of contributions, instead of shifting the cost to other contributing employers or to the public at large.

assets be held in a trust, *unless* the plan's assets consist of insurance. 29 U.S.C. § 1103(a), (b)(1)-(2).

Thus, Zurich plays exactly the same role in the employee benefits system that the multiemployer plans do. As all agree that the goal of § 507(a)(4) is furthered by giving priority to contributions to multiemployer plans, so too is it advanced by giving the very same priority to contributions for insurance to secure workers' compensation benefits.

B. The Priority Aids the Rehabilitation of Debtors by Inducing Insurers to Continue Coverage Needed to Do Business.

The priority also advances bankruptcy's purposes of "preserving going concerns and maximizing property available to satisfy creditors." *Bank of Am. Nat'l Trust & Savs. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999); *see also, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources").

To that end, the Code contains a number of provisions that encourage crucial third parties to continue doing business with a company that is facing serious financial difficulties. For example, § 507 itself gives very high priority to payment of the "actual, necessary costs and expenses of preserving the estate," thus recognizing the importance of encouraging creditors to provide the goods and services that a debtor requires for successful rehabilitation. 11 U.S.C. § 507(a)(1), (2); *see also* H.R. Rep. No. 95-595, at 186-87 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6147; 4 *Collier on Bankruptcy* ¶ 507.02[1][b] (2005). Indeed, post-petition claims for contributions to workers' compensation plans receive priority under this provision, because

continuing workers' compensation insurance for the debtor-in-possession is essential to preserving the bankruptcy estate's assets. *See, e.g., In re City Roofing Co. of Muskogee*, 208 B.R. 503, 505-06 (Bankr. E.D. Okla. 1997); U.S. Trustee Chapter 11 Guidelines, Part IV, *available at* http://www.bankruptcybar.org/ust/ust_guidelines.htm (requiring debtor to provide proof of workers' compensation insurance).

The Code also provides incentives for third parties to continue doing business with a struggling company prior to bankruptcy. For instance, the Code generally permits the trustee to avoid "preferences" (*i.e.*, recover payments by the debtor in the period right before bankruptcy), but Congress also specifically provided that the debtor's payments in exchange for "new value," and those made "in the ordinary course of business," are not avoidable. 11 U.S.C. § 547(b), (c)(1)-(2). The purpose of these exceptions "is to encourage creditors to continue doing business with troubled debtors who may then be able to avoid bankruptcy altogether." *In re Jones Truck Lines, Inc.*, 130 F.3d 323, 326 (8th Cir. 1997) (holding that contributions to employee benefit plans qualify for preference exemption based on new value supplied by employee services); *see also* 11 U.S.C. § 546(c)(1) (as amended 2005) (giving right to seller of goods to demand return of goods sold to debtor within 45 before bankruptcy filing).

Section 507(a)(4) serves the same function. In the unstable period when bankruptcy looms as a possibility and a financially insecure employer stops making its payments for workers' compensation coverage, a private insurer may well decide to cancel the insurance if there is no mechanism for obtaining payment after bankruptcy. Similarly, a union that maintains a benefit plan may call a strike or take other disruptive measures. And disgruntled employees who see their benefits disappearing – including employees of "self-

insured" businesses – are more likely to walk off the job. The priority provides an incentive against taking those actions by giving some assurance of ultimate payment. It thus encourages those with claims for contributions to give an employer breathing room – a chance to try to get back on its feet or at least to enter bankruptcy as a going concern.

This incentive is especially important in the case of employee benefit plans involving workers' compensation, because state laws generally render it unlawful for companies to operate without workers' compensation coverage.[35] Further, an employer that loses its private workers' compensation insurance on non-payment grounds generally cannot afford other coverage alternatives.

For employers, workers' compensation insurance is among their most critical assets. Giving priority to claims like Zurich's thus furthers the Code's most basic purpose by minimizing the likelihood that a troubled employer will be forced to liquidate, with the attendant loss of jobs and assets.

* * *

Workers' compensation is one of the oldest employee benefits, and still the only one that employers must provide in the majority of States, precisely because the health, disability, and death benefits it provides are critical to workers and their families, especially in industrial sectors. By giving a priority for contributions to an employee benefit plan, Congress manifested the very same interest in securing the financial health of the employee benefit system that motivated the States and Congress in their design of workers'

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[35] Some States authorize state regulators to force employers immediately to cease operations in the absence of workers' compensation coverage. *See, e.g.*, 820 Ill. Comp. Stat. 305/4(d); Tenn. Code Ann. § 50-6-412(g). Other States impose steep civil or criminal penalties on employers without coverage. *See, e.g.*, N.Y. Workers' Comp. Law § 52.

compensation systems. Petitioners would invert those policy concerns by denying priority for contributions to employee benefit plans precisely when the States, or Congress itself, deems the benefits so important as to make them mandatory. Nothing in § 507(a)(4) sanctions that counterintuitive result.

CONCLUSION

For the foregoing reasons, the decision of the Fourth Circuit should be affirmed.

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IN THE

Supreme Court of the United States

HOWARD DELIVERY SERVICE, INC., *et al.*,

Petitioners,

v.

ZURICH AMERICAN INSURANCE CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's Rule 29.6 Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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REPLY BRIEF FOR PETITIONERS

Section 507(a)(4) of the Bankruptcy Code grants a fourth priority to claims for "contributions to an employee benefit plan – arising from services rendered within 180 days before the date of the filing of the petition[.]" 11 U.S.C. § 507(a)(4). The only issue in this case is whether Zurich's claim for unpaid premiums due under the workers' compensation insurance policy issued to Howard is entitled to such priority. Zurich's argument proposes an inappropriately expansive reading of the "plain language" of § 507(a)(4), in derogation of the fundamental principles underlying the Bankruptcy Code. Such a broad reading of § 507(a)(4) does not comport with the overriding bankruptcy principle calling for equality of distribution among creditors, and the legislative history confirms that Zurich's claim is not entitled to priority.

A. Broadening the scope of § 507(a)(4) to include claims for unpaid workers' compensation insurance premiums is not appropriate.

This Court has on several occasions considered the scope of claim priorities contained in § 507(a) of the Bankruptcy Code, and, on each occasion, the Court has recognized that equality of distribution is the guiding principle that governs our bankruptcy system. *See Nathanson v. NLRB*, 344 U.S. 25, 29 (1952); *United States v. Embassy Rest. Inc.*, 359 U.S. 29, 31 (1959); *Joint Indus. Bd. v. United States*, 391 U.S. 224, 228 (1968). Under this general principle, all claims of a similar nature, such as unsecured claims, will share equally in the distribution of assets. When an unsecured claim qualifies for priority under one of the provisions of § 507(a), it automatically is elevated above other similar but

unqualified unsecured claims, which would otherwise be entitled to share equally in the distribution of available assets but for the statutory priority. Bankruptcy priorities represent the exceptions to the general rule of equality of distribution, and they accordingly are disfavored under the law.

Every claim that is granted priority directly reduces the funds available to general unsecured creditors. *Joint Indus. Bd.*, 391 U.S. at 228; *Ohio Bureau of Workers' Comp. v. Yoder (In re Suburban Motor Freight, Inc.)*, 36 F.3d 484, 487 (6th Cir. 1994). Claims granted priority also dilute the recovery of other priority claims of equal or lesser priority. For these reasons, it is essential that "statutory priorities are narrowly construed." *Trustees of the Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98, 100 (2nd Cir. 1986). The principle that priorities are exceptions to the general rule of equality of distribution requiring narrow construction is well settled, and Respondent does not seriously challenge it as a general proposition.[1]

Instead, Respondent argues against a narrow construction of § 507(a)(4) by characterizing the narrow construction rule

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1. In analogous situations, this Court has held that exceptions to general statutory provisions should be interpreted narrowly. *See, e.g., Commissioner v. Clark*, 489 U.S. 726, 739 (1989) ("In construing provisions [of the Internal Revenue Code] such as § 356, in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision."); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) ("To extend an exemption [to the wage and hour provisions of the Fair Labor and Standards Act of 1938] to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people.").

as "arbitrary" and Petitioners' reliance on it as "based on a faulty premise." Resp't Br. 36. In addition, Respondent tries to avoid application of the narrow construction rule by simply rephrasing the issue from whether Respondent's claim is entitled to priority over other claims to the circular and evasive question of whether it is entitled to share equally with other unsecured creditors whose claims do, in fact, qualify for priority treatment. *Id.* Restating the question in this manner merely begs the question of whether Respondent's claims are entitled to any priority. It does not negate the governing rule that all priorities must be narrowly construed.

Respondent's public policy argument similarly rests upon a circularity. It argues that its asserted right to priority treatment is bolstered by the important role played by providers of insurance coverage for workers' compensation benefits. Resp't Br. 44-50. Yet, the same argument can be made for all general unsecured creditors that have provided valuable goods and services to the debtor on credit. Lower courts have squarely identified and rejected the inherently circular nature of Respondent's argument:

> "[T]he insurance companies argue that preferential payment of their premiums is necessary to ensure the financial viability of the workers' compensation insurance industry. This argument, however, could easily be made by any creditor. In today's complex business marketplace, every business might necessarily have to rely on the prompt payment of bills to ensure its own financial stability. Yet, the very fact that the

> bankruptcy code exists is testament to the fact that businesses will sometimes not be in the position to satisfy their debts."

Mfr. Alliance Ins. Co. v. Satriale (In re Allentown Moving & Storage, Inc.), 214 B.R. 761, 766 (E.D. Pa. 1997) (quoting *In re Arrow Carrier Corp.*, 154 B.R. 642, 646 (Bankr. D.N.J. 1993)).

Most bankruptcies have creditors who can assert that their claims should be entitled to priority treatment because they have provided "benefits" to "employees" under some form of "plan." For example, using Respondent's logic, the contractor who installs OSHA-required factory equipment designed to provide a safer workplace, the printing company that prints employee health care manuals, and the insurance provider that writes a general liability policy covering the company vehicles would be entitled to priority treatment. Such a result "would turn on its head the traditionally egalitarian manner in which the Bankruptcy Code has dealt with competing creditors, who by definition fight over very limited assets." *Yoder v. Ohio Bureau of Workers' Comp. (In re Suburban Motor Freight, Inc.)*, 998 F.2d 338, 341 (6th Cir. 1993).

Respondent's arguments ignore this Court's holding in *Nathanson v. NLRB*, 344 U.S. 25, 29 (1952), that "if one claimant is to be preferred over others, the purpose should be clear from the statute." *Accord Embassy Rest.*, 359 U.S. at 31; *Matter of Jartran, Inc.*, 732 F.2d 584, 586 (7th Cir. 1984) (affirming that "priority should not be afforded unless it is founded on a clear statutory purpose"). If Congress had intended to include statutorily-mandated workers' compensation insurance programs within the definition of

"employee benefit plans," it would have done so using plain and unambiguous language in § 507(a)(4), or it would have granted expressly a priority to workers' compensation claims, as it did when it amended the Bankruptcy Act in 1934 to give workers' compensation claims a seventh level priority and wages a fourth level priority. *Embassy Rest.*, 359 U.S. at 32. Although the Fourth and Ninth Circuits have ruled otherwise, the Sixth, Eighth and Tenth Circuits have each found that Congress did not grant such a priority pursuant to § 507(a)(4). Accordingly, as this Court reasoned when the issue was whether fringe benefits such as contributions to an annuity plan were entitled to priority, "[i]f there is still any question as to whether claims for unpaid contributions to provide deferred benefits to employees should share the assets of bankrupts with general creditors or should be entitled to the limited priority granted wages due to workmen, any new resolution of that question should come from Congress." *Joint Indus.*, 391 U.S. at 229. There simply is no basis consonant with the general principle of equality of treatment of creditors for expanding the scope of § 507(a)(4) to include claims for unpaid workers' compensation insurance premiums.

B. The legislative history confirms that Congress intended to limit § 507(a)(4) to fringe benefits.

Respondent similarly does not adequately rebut the argument (and finding by Judges Shedd and Niemeyer of the Fourth Circuit) that the phrase "contributions to an employee benefit plan arising from services rendered" is ambiguous in the context of § 507(a)(4). The Bankruptcy Code does not define these terms, either separately or as used collectively in § 507(a)(4). Moreover, Respondent fails to address the fact that the Sixth, Eighth and Tenth Circuits, on the one

hand, and the Fourth and Ninth Circuits, on the other, have reviewed these terms and reached opposite conclusions as to their meaning, a strong indication that there may be more than one reasonable interpretation of the language of Section 507(a)(4). *See State Ins. Fund v. Southern Star Foods, Inc.* (*In re Southern Star Foods, Inc.*), 144 F.3d 712, 715 (10th Cir. 1998) ("The split in the circuits is, in itself, evidence of the ambiguity of the phrase 'contributions to an employee benefit plan[.]'"). To clarify any such ambiguity, the Court should review the legislative history of § 507(a)(4).[2]

While Respondent accuses Petitioners of relying on mere "snippets" of legislative history,[3] there is, in fact, an abundance of legislative history supporting the conclusion that Congress simultaneously amended § 507(a)(3) and added § 507(a)(4) with the express intent of providing employees greater priority treatment for their direct wages and "all other forms of employee compensation that is not in the form of wages[,]" *i.e.*, fringe benefits. H.R. Rep. No. 95-595, at 357 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313. Furthermore, ample authority exists in the legislative history to contradict Respondent's assertions[4] that § 507(a)(4) was not intended to "overrule" *Embassy Restaurant* and *Joint Industry* or to supplement the reach of § 507(a)(3) so as to encompass fringe benefits.[5] The Commission Report on what

2. *See also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 255 (1992) ("Whenever there is some uncertainty about the meaning of a statute, it is prudent to examine its legislative history.") (Stevens, J., concurring).

3. Resp't Br. 31.

4. Resp't Br. 32.

5. *See* Pet'r Br. 33-35.

became the Bankruptcy Act of 1978 explained the newly proposed § 507(a)(4)[6] as follows:

> For the same reason as that justifying a priority for wages paid directly to the employee, the Commission also recommends that the priority be extended to include fringe benefits. Fringe benefits are now considered part of the basic wage package that an employee receives from his employer. As pointed out by Mr. Justice Black, dissenting in *United States v. Embassy Restaurant, Inc.*, "It is hard . . . to see how they could not be 'wages.' The payments are certainly not gifts." Union negotiators agree to smaller direct wages in exchange for greater fringe benefits.

Report of the Comm'n on the Bankr. Laws of the United States, H.R. Doc. No. 93-137, 93rd Cong., 1st Sess. (1973), *reprinted in* COLLIER ON BANKRUPTCY App. 4(c) 4-479 through 4-480.

The Commission Notes to § 507(a)(4) make clear that the new provision was intended to "overrule" *Joint Industry* and *Embassy Restaurant*, so that "[t]he longstanding dispute as to whether fringe benefits should be considered wages is mooted." *Id.* at 4-680. Furthermore, the Commission Notes state that the new priority provision "gives fringe benefits a priority behind wages, thus disposing of one of the policy reasons for the *Embassy* case, *i.e.*, that fringes payable might compete with and reduce payments of wage claims." *Id.* at 4-680 through 4-681. The legislative history thus leaves little doubt that Congress intended the phrase "employee benefit plans" in § 507(a)(4) to refer to fringe benefits that

6. The provision was originally designated as § 4-405(a)(4).

were included as part of a "wage package" negotiated (either explicitly or implicitly) between employer and employee, and not to statutorily-mandated workers' compensation coverage over which neither employer nor employee had any control.

Respondent and its Amici Curiae nevertheless seek to push the meaning of "employee benefit plan" beyond its intended scope by citing to the testimony of various witnesses who recommended that Congress change the proposed language "pension, insurance or similar employee benefit plans" to simply "employee benefit plans." While it is true that certain witnesses raised concerns that the originally proposed language might define the scope of "employee benefit plans" too narrowly, the testimony in question does not logically support the inclusion of workers' compensation with the type of employee benefit plans that were being addressed.

For example, when Max Zimny, General Counsel, International Ladies Garment Workers Union, AFL-CIO, testified about the qualifying phrase "pensions, insurance or similar employee benefit plans" that was initially proposed for § 507(a)(4), he noted that this language might not be broad enough to include "benefits like scholarships, prepaid legal plans, daycare centers, apprenticeship training and the like[.]" Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary (the "Subcommittee Hearing Report"), 94th Cong. (1976) at 2431-32 (Testimony of Max Zimny, International Ladies Garment Workers Union, AFL-CIO). Mr. Zimny explained that these types of plans were already included in Section 302(c) of the Labor-Management Relations Act "as fringe benefits subject to collective bargaining" and that the list of such bargained-for benefits would continue to grow. *Id.* at 2425.

Mr. Zimny went on to explain the nature of these fringe benefits as wage substitutes:

> [W]ages cover not only direct take-home pay. When unions and employers negotiate, they negotiate a total wage package which is then divided, depending on the particular circumstances of the industry and of the times, into so much for direct take-home pay and so much for medical, dental, legal, pension, and other employee benefit coverage. . . . But wages are as truly one as they are the other.

Id. at 2427.

Conspicuously absent from any of the testimony or statements in the legislative history is a suggestion by any of the witnesses that workers' compensation benefits should be included within the definition of "employee benefit plans." To the contrary, each of the witnesses focused on the need to structure § 507(a)(4) so as to permit the future inclusion of new forms of negotiated fringe benefits, such as those identified by Mr. Zimny. Not one of these witnesses suggested that workers' compensation benefits should be included in the priority provision.

Indeed, it appears that Jeffrey Gibbs, Counsel, Industrial Union Department, AFL-CIO, made the only direct reference to workers' compensation benefits. But, he did so to *distinguish* negotiated fringe benefits from statutory benefits. Thus, Mr. Gibbs first lauded the protections that already had

been granted through statutory benefits under federal and state laws:

> Since 1926 we have seen a spectacular increase in government interest and support of federal and state legislation and programs to increase the protection of the worker against the ravages of economic displacement. Unemployment compensation and workmen's compensation laws have been enacted throughout the country, and benefits for those programs have been raised on a regular basis.

Id. at 2434 (Statement of Jeffrey Gibbs). He then contrasted the gains made on this statutory front with the lack of comparable gains to protect wages and fringe benefits under the bankruptcy laws. *Id.* at 2435. The only possible interpretation of this particular testimony, and of the absence of any other discussion of workers' compensation in connection with § 507(a)(4), is that the witnesses did not consider workers' compensation benefits to be within the scope of the "employee benefit plans" that Congress was addressing with respect to the amendments to the priority provisions of the Bankruptcy Code.

Finally, Respondent's argument that § 507(a)(4) should be read to encompass unpaid workers' compensation insurance premiums, regardless of its lack of evidence of Congressional intent and the lack of a compelling plain meaning that requires Respondent's interpretation, must fail. Respondent cites several cases for the proposition that "broad statutory language may not be construed narrowly merely because it encompasses situations in addition to those on which Congress focused at the time of enactment." Resp't

Br. 15. This reliance on those cases is misplaced for several reasons.

First, none of the cited cases involved the interpretation of claim priorities which, as previously discussed, must be read narrowly and not broadly. Second, in each of the cases cited, this Court found the language of the statute to be clear on its face. For example, in *Union Bank v. Wolas*, 502 U.S. 151, 155 (1991), the Court held that the statutory language of § 547(c)(2) (ordinary course of business defense to preference actions) made no distinction between payments on long-term and short-term debt and thus both fell within the defense. Similarly, in *Toibb v. Radloff*, 501 U.S. 157, 160-161 (1991), this Court held that the language in § 109 (defining who may be a debtor under the various chapters of the Bankruptcy Code) did not contain an ongoing business requirement for relief under Chapter 11, and that an individual debtor not engaged in business therefore was eligible for relief under Chapter 11. *See also Patterson v. Shumate*, 504 U.S. 753, 761 (1992) (finding that the clarity of the statutory language "applicable nonbankruptcy law" in § 541 did not require a review of the legislative history); *FCC v. NextWave Pers. Comm., Inc.*, 537 U.S. 293 (2003) (finding that the language of § 525(a) clearly prohibits revocation of broadband personal communications service licenses issued by the FCC for nonpayment).

In each of these cases, the Court ultimately held that the statutory language was clear. Those holdings mean little if the Court determines that the language of § 507(a)(4) is ambiguous, in which case the Court must consider Congressional intent. At that point, legislative intent should control and the cases relied upon by Petitioner become inapposite. When reviewed as a whole, the legislative history

clearly illuminates Congress' intent in enacting § 507(a)(4) – to provide employees greater priority treatment for their direct wages and their negotiated fringe benefits.

CONCLUSION

Section 507(a)(4) of the Bankruptcy Code establishes a priority for "contributions to an employee benefit plan arising from services rendered" as an exception to the general rule in bankruptcy of equality of distribution. It cannot be broadened arbitrarily to include unpaid premiums for statutorily mandated workers' compensation insurance coverage. Expanding the scope of § 507(a)(4) in this manner should not be done absent a compellingly clear plain meaning of the statute, which does not exist, or clear Congressional intent, which similarly does not exist. To the contrary, it is clear from the legislative history that Congress never intended to afford priority treatment to unpaid workers' compensation insurance premiums. This priority, like all bankruptcy priorities, must be narrowly construed.

For all of the reasons stated herein, Howard and the Committee respectfully request that this Court reverse the decision of the Fourth Circuit and deny priority treatment to Zurich's claim for unpaid insurance premiums.

Respectfully submitted,

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(6)

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IN THE

Supreme Court of the United States

HOWARD DELIVERY SERVICE, INC. ET AL.,

Petitioners,

v.

ZURICH AMERICAN INSURANCE CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN HOME ASSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, THE ST. PAUL TRAVELERS COMPANIES, AND THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

In a bankruptcy case, is an unsecured claim for unpaid premiums owing for a debtor's statutory workers' compensation liability insurance policy entitled to priority under section 507(a)(4) of the Bankruptcy Code as a "contribution to an employee benefit plan arising from services rendered," as held by the Fourth and Ninth Circuits, or is such a claim not entitled to section 507(a)(4) priority, as held by the Sixth, Eighth, and Tenth Circuits?

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INTEREST OF THE AMICI

Amici Curiae American Home Assurance Company ("AHAC"), Hartford Fire Insurance Company ("Hartford"), the St. Paul Travelers Companies (collectively, "Travelers"), and the American Insurance Association ("AIA") respectfully submit this brief in support of the Respondent Zurich American Insurance Company ("Zurich"). Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief.[1]

The issue in this case is whether Zurich's claim for unpaid workers' compensation insurance premiums is entitled to priority under section 507(a)(4) of the Bankruptcy Code.

Approximately nine out of ten employees in the nation's workforce are covered by workers' compensation insurance, and some form of workers' compensation insurance is mandatory for nearly all employees in all States. On average within the industry, for every premium dollar that workers' compensation insurers take in, they spend almost $1.10 on claims and expenses. Cost components include medical benefits, payments for lost wages, and uncollected premiums.

The ability of insurers to collect premiums -- which obviously is enhanced or diminished by an insurer's ability to claim priority treatment under section 507(a)(4) -- has a direct impact on the availability and cost of workers' compensation coverage. To the extent that insurers are unable to collect premiums from debtors that file for bankruptcy because the insurers' claims do not enjoy priority under section 507(a)(4), workers' compensation insurance will be more costly, and, hence, fewer businesses will be able to obtain it. In addition, to

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[1]Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amicus curiae*, made a monetary contribution to the preparation or submission of this brief. To the extent not previously filed, copies of the letters of the parties consenting to the filing of this brief are lodged herewith.

the extent that insurers are unable to recover premiums from debtors that file for bankruptcy, insurers will be more likely to cancel insurance coverage when a debtor suffers financial distress, or require greater assurance of payment through payment devices such as guaranties, bonds, or letters of credit. These further precautions carry significant additional cost that some debtors will be unable to afford, and the added cost will make it less likely that debtors suffering financial distress will be able to recover. Like Zurich, AHAC, Hartford, Travelers, and certain members of the AIA[2] are insurance carriers that write workers' compensation insurance and, thus, the question presented is of vital significance to them.

Consistent with Supreme Court Rule 37.1, the purpose of this brief is to bring to the Court's attention matters that other parties do not intend to address. In addition to analyzing the plain meaning of the relevant statutory text from a distinct perspective, this brief also addresses the evolution of the language of section 507(a)(4) as a result of testimony in Congress favoring inclusion of multiple types of employee benefit plans within its scope. AHAC, Hartford, Travelers, and

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[2] The AIA, founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA promotes the economic, legislative, and public standing of its members; it provides a forum for discussion of policy problems of common concern to its members and the insurance industry; and it keeps members informed of regulatory and legislative developments. AIA members write a major share of workers' compensation insurance throughout the country. Clearly, AIA and its members have a strong interest in the stability of the nation's workers' compensation system. Amici Hartford and Travelers are AIA members, as is respondent Zurich. AIA is headquartered in Washington, D.C., maintains six regional offices, and retains legislative counsel in every state. Among its other activities, AIA files *amicus* briefs in cases before state and federal courts on issues of importance to the insurance industry.

the AIA respectfully submit that, in deciding the instant controversy, the Court would benefit from consideration of the matters addressed herein.

STATEMENT

This matter arises out of the chapter 11 bankruptcy case of Petitioner Howard Delivery Services, Inc. ("Howard" or "Petitioner"). Prior to Howard's bankruptcy filing, Zurich provided health, disability, lost-wage, and death benefits to Howard's employees under certain workers' compensation insurance contracts. During the 180-day period prior to its bankruptcy filing, Howard became liable to pay premiums for this insurance in the amount of $410,215, giving rise to Zurich's claim.

Zurich filed a proof of claim in Howard's bankruptcy case for the $410,215 in unpaid premiums, asserting that its claim was entitled to priority treatment under section 507(a)(4) of the Bankruptcy Code. 11 U.S.C. § 507(a)(4). Howard objected to the priority treatment of Zurich's claim, and the bankruptcy court upheld Howard's objection. The district court affirmed the bankruptcy court's decision and the Fourth Circuit reversed.

The bankruptcy and district courts employed unsound reasoning in concluding that Zurich's claim is not entitled to priority under section 507(a)(4). Rather than enforce the plain meaning of the statute, both courts enforced their interpretation of its legislative history. As this Court has repeatedly explained, where, as here, the text of a statute is plain, a court should not resort to analysis of legislative history, and certainly may not do so to reach a result at odds with the statutory text.

The bankruptcy and district courts also misinterpreted the relevant legislative materials in concluding that they delineate the particular employee benefit plans covered by the text of section 507(a)(4). Read in context, the legislative history merely provides a non-exhaustive list of the types of employee benefit plans that are included within the scope of the statute. Accordingly, it was improper for the bankruptcy and district

courts to treat the illustrations set forth in the legislative materials as exclusive.

The Fourth Circuit reversed, correctly holding in a per curiam opinion that Zurich's claim for unpaid workers' compensation insurance premiums is entitled to priority under section 507(a)(4). *In re Howard Delivery Serv., Inc.*, 403 F.3d 228 (4th Cir. 2005). Judges King and Shedd filed separate concurring opinions, each using a different approach to reach the same conclusion. Judge King concluded that Zurich's claim for unpaid workers' compensation insurance premiums is entitled to priority under section 507(a)(4) based on the plain meaning of the statute, whereas Judge Shedd, finding the term "employee benefit plan" to be ambiguous, reached the same conclusion after looking to the legislative history for guidance. Under either approach, the decision of the Fourth Circuit should be affirmed.

SUMMARY OF ARGUMENT

Zurich holds a claim against Howard for Howard's failure to pay premiums for the workers' compensation insurance coverage that Zurich provided for Howard's employees. The undisputed purpose of this insurance was to provide health, disability, lost-wage, and death benefits to Howard's employees who were injured during the course of their employment. Because Zurich's claim falls within the plain meaning of section 507(a)(4), it is entitled to the priority treatment afforded by the statute.

By its plain terms, section 507(a)(4) affords priority status to claims for "contributions" to an "employee benefit plan" that arise from "services rendered" within 180 days of a debtor's commencement of a bankruptcy case. As numerous courts have properly concluded, insurance plans that provide workers' compensation benefits are classic examples of "employee benefit plans." Moreover, Howard's obligation to pay premiums for Zurich's insurance coverage properly constitutes an obligation to make "contributions" within the meaning of section 507(a)(4). Finally, Zurich's claim properly arises from "services rendered" during the relevant 180-day period because, during this period,

Howard's employees performed employment services and Zurich provided insurance coverage, thereby giving rise to Howard's obligation for the premiums.

In addition, treating Zurich's claim as entitled to priority under section 507(a)(4) is necessary to fulfill the policy of the statute, which is to promote the provision of employee benefits to a debtor's employees. As the First Circuit has concluded: "To allow the insurer to obtain its premiums through the priority would seem the surest way to provide employees with the policy benefits to which they are entitled." *In re Saco Local Dev. Corp.*, 711 F.2d 441, 449 (1st Cir. 1983).

Finally, far from demonstrating that Congress intended to exclude workers' compensation benefits from the scope of section 507(a)(4), the legislative history actually demonstrates the opposite -- that these benefits are precisely the type that Congress intended should fall within the scope of the statute. Accordingly, Zurich's claim is entitled to priority under section 507(a)(4).

ARGUMENT

A. Zurich's Claim Is Entitled To Priority Under The Plain Terms Of Section 507(a)(4).

This Court has made clear that, in construing the Bankruptcy Code, "when the statute's language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 7 (2000); *see Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). In this instance, the language of section 507(a)(4) is plain and encompasses Howard's premium obligation. Moreover, the disposition required by this plain reading of the text is hardly absurd. Accordingly, the decision of the Fourth Circuit should be affirmed.

Section 507 of the Bankruptcy Code specifies the types of claims that are entitled to priority treatment in a chapter 11

bankruptcy case. As is relevant here, section 507(a)(4) provides as follows:

> (a) The following expenses and claims have priority in the following order:
>
> (4) Fourth, allowed unsecured claims for contributions to an employee benefit plan --
>
> (A) arising from services rendered within 180 days before the date of the filing of the petition . . .; but only
>
> (B) for each such plan, to the extent of --
>
> (i) the number of employees covered by each such plan multiplied by 4,000; less
>
> (ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

11 U.S.C. § 507(a)(4).[3]

By its terms, section 507(a)(4) affords priority status to claims for "contributions" to "an employee benefit plan" that arise from "services rendered" within 180 days of the commencement of a bankruptcy case. In this case, Zurich's claim meets all three requirements.

Employee Benefit Plans. While the Bankruptcy Code does not define "employee benefit plan," it is difficult to imagine

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[3]The text is quoted from the statute in effect at all times relevant herein. Although section 507(a)(4) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-08, the revisions are immaterial to the resolution of this case.

a clearer or more compelling example of an "employee benefit plan" than a workers' compensation insurance program. Generally, a workers' compensation program is "a mechanism for providing cash-wage benefits and medical care to victims of work-connected injuries." Timothy A. Huffman, *A Guide to Self-Insurance Under the West Virginia Workers' Compensation System*, 96 W. VA. L. REV. 781, 781-82 (1994) (citing Arthur Larson, *Workmen's Compensation Law* § 1.00 (1993)). As Judge King explained in his concurring opinion, "a detailed contractual arrangement enabling an employer to provide health, disability, lost-wage, and death benefits to employees who are injured in the course of their employment," such as the workers' compensation policy at issue here, is "within the plain meaning of [the] statutory term." *Howard Delivery*, 403 F.3d at 235-36 (King J., concurring). Other courts have also noted:

> Workers' compensation benefits are classic benefits that inure to employees. When an employee is injured on the job, workers' compensation covers health care costs, death benefits, and lost wages. Thus, the underlying payments to injured employees from workers' compensation fit the archetypical examples of employee benefit plans such as health insurance, disability, and pension plans.

In re Integrated Health Servs., Inc., 291 B.R. 611, 613 (Bankr. D. Del. 2003); *see also Employers Ins. of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605, 607 (9th Cir. 1993) (employer-funded workers' compensation insurance is an "employee benefit plan" within the meaning of section 507(a)(4)); *Ivey v. Great Western Life & Annuity Ins. Co.*, 308 B.R. 752, 756 (Bankr. M.D.N.C. 2004), *aff'd*, 405 F.3d 191 (4th Cir. 2005); *In re The Montaldo Corp.*, 232 B.R. 853, 854-55 (M.D.N.C. 1997); *In re Allegheny Int'l, Inc.*, 138 B.R. 171, 173-74 (Bankr. W.D. Pa. 1992); *State ex rel. McKensie v. Smith*, 569 S.E.2d 809, 817 (W. Va. 2002) (under West Virginia law, workers' compensation coverage "provides benefits to workers who have 'received personal injuries in the course of and resulting from their covered employment'") (quoting W. Va. Code § 23-4-1).

Although it is true that most States *require* employers to provide workers' compensation benefits to employees (by mandating either participation in a state-run fund, complying with a state-monitored self-insurance program, or through the purchase of private insurance), this does not alter the conclusion that workers' compensation insurance fits within the scope of "employee benefit plan." While Petitioner focuses on the "involuntary" aspect of workers' compensation in arguing that such programs are not "employee benefit plans," the fact that States find these benefits to employees so important as to make them mandatory or otherwise the subject of legislation weighs in favor of granting priority, not denying it.[4]

Petitioner also argues that employers gain benefits by providing workers' compensation coverage and, therefore, workers' compensation is not an "employee benefit plan." *See, e.g.*, Pet. Br. at 8. While it is generally true that employers receive benefits (e.g., immunity from tort liability for work-related injuries) in return for providing workers' compensation coverage, and that the obligation to provide workers' compensation benefits is commonly backed by civil and criminal sanctions, *see, e.g.*, N.Y. Work. Comp. Law § 52 (McKinney 1994 & Supp. 2004); W. Va. Code § 23-2-5 (West 2004), it does not follow that workers' compensation is not an "employee benefit plan" entitled to priority under section 507(a)(4). Indeed, section 507(a)(4) contains no limitation based on whether the contribution is pursuant to contract, or is gratuitous, or compelled by applicable law. If Congress had intended any such limitation, it would have included it in the statutory text, and the fact that Congress did not include such a limitation means that it

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[4]Petitioner's reliance on *New Neighborhoods, Inc. v. West Va. Workers' Comp. Fund*, 886 F.2d 714 (4th Cir. 1989), is misplaced, as section 507(a)(4) was not before the court in that case and "the sole question presented [wa]s whether the premiums . . . constitute excise taxes within the meaning of section 507(a)(7)(E)." *See* 886 F.2d at 716.

had no such intention. *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293, 302 (2003); *Johnson v. Home State Bank*, 501 U.S. 78, 87 (1991); *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522-23 (1984).

Whatever the employer's particular motivation or obligation to provide workers' compensation, the relevant inquiry under section 507(a)(4) is whether this coverage constitutes a "plan" that provides "employee benefits." *See Plaid Pantries*, 10 F.3d at 607 ("Nor can we conclude that Congress intended to distinguish between benefit plans that are contractually promised to employees and those that are statutorily required."). Clearly, insurance coverage that provides health benefits, as well as income, to injured employees that are otherwise unable to earn a living falls within the scope of any reasonable interpretation of the phrase "employee benefit plan." *Id.*

Howard concedes that health insurance coverage falls within the scope of section 507(a)(4). *See, e.g.*, Pet. Br. at 8. As noted, medical care is also one of the benefits provided under workers' compensation insurance. It is difficult to understand why health insurance coverage provided under a health insurance policy qualifies as an employee benefit plan, yet medical care coverage provided under a workers' compensation insurance policy does not. There can be no dispute that benefits provided to employees under workers' compensation policies are just as critical to vulnerable employees in need of such benefits as are the benefits cited by Howard. To the extent that workers' compensation insurance provides the same benefits to employees, the argument in favor of according priority under section 507(a)(4) is equally compelling. Again, the only reasonable interpretation of section 507(a)(4) is that a workers' compensation insurance program is an "employee benefit plan."

Contributions. Similarly, although the Bankruptcy Code does not define the term "contributions" for purposes of section 507(a)(4), the term plainly encompasses a debtor's contractual

obligation to pay premiums for health, disability, lost-wage, and death-benefit coverage under a workers' compensation insurance policy. Indeed, a clearer example of an obligation to make "contributions" is difficult to imagine. *See Saco*, 711 F.2d at 449; *Ivey*, 308 B.R. at 756. As Judge King noted in his concurrence, "an accepted and ordinary meaning of the term 'contributions' is that they include sums 'paid by an employer to [a] group-insurance fund . . . for employees.'" *Howard Delivery*, 403 F.3d at 235 (citation omitted). Howard's obligation to pay for workers' compensation insurance is as much an obligation to make a "contribution" as it would be if Howard itself had been responsible for supplying directly the health, disability, lost-wage, and death benefits that Zurich provided.

Services Rendered. Finally, Howard's obligation to pay workers' compensation premiums arises from "services rendered" by Zurich (i.e., providing coverage to employees that ensures that they will receive benefits) during the 180 days prior to Howard's bankruptcy filing. The text of section 507(a)(4) does not state that the "services" must be "rendered" by "employees" in order to fall within the scope of the statute; nor does it otherwise limit the applicability of the priority to "services rendered" by any particular persons or entities. The absence of any such qualification must be viewed as deliberate, and the most obvious and reasonable interpretation of the phrase "services rendered" in its unqualified form is that Congress recognized that sometimes the relevant services giving rise to a claim would be rendered by employees, sometimes by parties such as insurers, and sometimes by others, such as plan administrators who are not insurers.

Even if the phrase "services rendered" were construed to mean "services rendered by employees," Zurich's claim still qualifies. As Judge King explained, "[i]t is only because workers were employed by Howard (and providing services to it) prior to the bankruptcy filing that Howard's obligation to provide insurance and pay the necessary premiums arises," and reading into section 507(a)(4) a limitation precluding insurance

carriers from priority "seeks to inappropriately limit the breadth of the relevant term." *Howard Delivery*, 403 F.3d at 238.

The Amici take the position that it is clear from a plain reading of the statutory text that Zurich's claim for premiums for the insurance coverage it provided during the statutory period arises from "services rendered" during such period. The Amici note that the Court need not reach the issue whether "services rendered" means "services rendered by employees" or "services rendered by the claimant asserting the claim" in order to resolve this case, as this record presents a circumstance in which "services" were "rendered" by both employees and Zurich during the relevant period.[5]

In sum, the language of section 507(a)(4) is plain and encompasses Howard's premium obligation. Moreover, the disposition required by the plain reading of the text is hardly absurd. Accordingly, the Court should affirm the Fourth Circuit's ruling that Zurich's claim is entitled to priority under section 507(a)(4).

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[5] Some courts have concluded that "services rendered" refers to services performed by the employees of the debtor, while others have concluded that it refers to the provider of benefits giving rise to the claim (here the insurer) rather than the employee. *See In re Braniff, Inc.*, 218 B.R. 628, 631 (Bankr. M.D. Fla. 1998) (citing cases); *see also In re A.B.C. Fabrics of Tampa, Inc.*, 259 B.R. 759, 765-7 (Bankr. M.D. Fla. 2001). In this case, this is a distinction without a difference because coverage was provided and workers were employed in the relevant timeframe. *See Howard Delivery*, 403 F.3d at 238 ("Regardless of whether the term . . . refers to the provision of insurance or is limited to employee's services, the Zurich Claim satisfies this aspect of the Statute.").

B. A Plain Reading Of Section 507(a)(4) To Include Zurich's Claim Is Necessary To Fulfill The Policy Of The Statute.

Like its text, the purpose of section 507(a)(4) is plain. As the First Circuit has explained, "Congress' object in enacting § 507(a)(4) was to extend the 1898 Act's wage priority to new forms of compensation," including employer-funded insurance for employees. *Saco*, 711 F.2d at 449. "To allow the insurer to obtain its premiums through the priority would seem the surest way to provide employees with the policy benefits to which they are entitled." *Id.* Thus, "[t]he [insurer] is protected in order to protect [the] employees." *Id.*; *see also Plaid Pantries*, 10 F.3d at 607 ("The purpose of Section 507(a)(4) is to protect workers' benefit plans."). The failure to afford priority to Zurich's claim in this case would undermine the policy of section 507(a)(4).

While the courts of appeals are split over the proper interpretation of section 507(a)(4), they are in agreement regarding the statute's underlying policy concern: to protect employees. Even courts that have denied the applicability of section 507(a)(4) to workers' compensation insurance plans have conceded that the purpose of both section 507(a)(4) and of workers' compensation insurance generally is to benefit employees. *See State Ins. Fund v. Southern Star Foods, Inc. (In re Southern Star Foods, Inc.)*, 144 F.3d 712, 716 (10th Cir. 1998) ("The legislative history makes it clear that Congress enacted section 507(a)(4) to benefit employees."); *Employers Ins. of Wausau v. Ramette (In re HLM Corp.)*, 62 F.3d 224, 226 (8th Cir. 1995) ("workers' compensation programs are certainly designed to benefit employees"). This policy is plainly served by including claims held by insurers within the scope of the section, and disserved by excluding them.

The priority afforded by section 507(a)(4) creates an obvious incentive for insurers to continue to provide coverage to financially troubled debtors (and, in turn, make lost-wage and benefit payments to employees) because, by virtue of the priority, insurers are more likely to receive payment of unpaid

premiums. Conversely, eliminating the priority would lead insurers to decline to continue coverage for troubled firms to the extent that they may cancel coverage under their respective policies for nonpayment of premiums. As one court has recently explained in applying section 507(a)(4) in a similar context:

> An insurance company that continues to provide health benefits to employees during an employer's periods of financial difficulty is protecting employees who stay with the employer. Were insurance companies to not receive priority in bankruptcy, continued health benefits may not be available to the employees of struggling businesses.

Ivey, 308 B.R. at 757. That result obviously would harm the very employees that Congress hoped to protect. Accordingly, allowing Zurich's claim is necessary to fulfill the policy of the statute.

C. The Legislative History Of Section 507(a)(4) Demonstrates That It Encompasses Zurich's Claim.

While a "plain language" analysis demonstrates that workers' compensation insurance premiums fall within the scope of section 507(a)(4), a proper review of the relevant legislative history provides additional support for affirming the Fourth Circuit's decision.

1. The text of section 507(a)(4) is not limited to merely overruling prior case law.

In *Brogan v. United States*, 522 U.S. 398 (1998), this Court admonished that "it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy -- even assuming that it is possible to identify that evil from something other than the text of the statute itself." 522 U.S. at 403. Accordingly, limitations on plain statutory text cannot be inferred from legislative history. *See Toibb v. Radloff*, 501 U.S. 157, 162 (1991) (declining to infer limitation on section 109 of the Bankruptcy Code based on statements in the legislative history). Notwithstanding the

Court's clear instructions and the unqualified language that Congress selected in enacting section 507(a)(4), some courts, including the bankruptcy and district courts in this case, have erroneously limited the scope of section 507(a)(4) based upon a statement in the legislative materials that, in enacting this statute, Congress intended to overrule *United States v. Embassy Restaurant*, 359 U.S. 29 (1958), and *Joint Indus. Bd. of Elec. Indus. v. United States*, 391 U.S. 224 (1968).

In *Embassy Restaurant*, this Court construed a section of the former Bankruptcy Act of 1898 that granted priority status for claims for "wages . . . due to workmen." 11 U.S.C. § 104 (*repealed* 1978). The Court considered whether a claim for contributions to a labor welfare fund for life insurance and medical benefits qualified as "wages" within the meaning of the provision; concluded that it did not; and, therefore, held that the claim was not entitled to the statutory "wage" priority. 369 U.S. at 35. In response, Congress stated in the legislative materials accompanying section 507(a)(4): "Paragraph (4) overrules *United States v. Embassy Restaurant*, 359 U.S. 29 (1958), which held that fringe benefits were not entitled to wage priority status. The bill recognizes the realities of labor contract negotiations, where fringe benefits may be substituted for wage demands." S. Rep. No. 95-989, at 69 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5855; *see Howard Delivery*, 403 F.3d at 234.

Some courts have taken the statement in the legislative materials that Congress intended to overrule *Embassy Restaurant*, not simply as an example of Congress's intent in enacting section 507(a)(4), but rather as restricting the section narrowly to accomplish *only* this objective. Noting that, on its facts, *Embassy Restaurant* excluded insurance and other payments that were "bargained-for" "fringe benefits" rather than "wages," some courts have reasoned by implication that the current statute should cover only "bargained-for, wage-substitution-type benefits." *See In re Birmingham-Nashville Express, Inc.*, 224 F.3d 511, 517 (6th Cir. 2000) ("we hold that the term 'employee benefit plan' is limited to wage substitutes"). In his concurrence below, Judge King rejected this approach:

"Put simply, we are not entitled to require an employee benefit plan to qualify as a wage substitute or to require that participation in such a plan be voluntary, thereby engrafting limitations on statutory provisions in order to 'achieve that which Congress is perceived to have failed to do.'" *Howard Delivery*, 403 F.3d at 237 (quoting *United States v. Locke*, 471 U.S. 84, 95 (1985)).

Judge King's approach is entirely correct. The terms implicated in *Embassy Restaurant* -- "bargained-for," "wage-substitute," and "fringe benefit" -- do not appear in section 507(a)(4). Moreover, that Congress may have intended section 507(a)(4) to overrule *Embassy Restaurant* does not demonstrate that this was Congress's *sole* purpose or intent in changing the law; nor does it demonstrate that Congress intended section 507(a)(4) to be limited to the facts at issue in *Embassy Restaurant*. *See Brogan*, 522 U.S. at 403; *Radloff*, 501 U.S. at 162; *Saco*, 711 F.2d at 448 (rejecting argument that section 507(a)(4) is limited to the circumstances of *Embassy Restaurant*).[6]

In *In re Saco Local Dev. Corp.*, 711 F.2d 441 (1st Cir. 1983), then-Judge Breyer, writing for the First Circuit, used a common-sense approach in holding that health, life, and disability insurance premiums owed to an insurer qualified for priority treatment under section 507(a)(4). The debtor in that case employed "several hundred non-unionized employees" and provided them with life, health, and disability insurance. 711

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[6] Furthermore, workers' compensation benefits plainly *are* "wage-substitution-type benefits," even if not "bargained for." Workers' compensation insurance provides lost-wage compensation to injured employees as a substitute for wages they otherwise would have earned. *See Howard Delivery*, 403 F.3d at 240 n.1 (Shedd, J., concurring) ("Under this very broad language, workers' compensation would qualify as 'employee compensation that is not in the form of wages.'") (quoting H.R. Rep. No. 95-595, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6148).

F.2d at 448. The debtor was not bound to provide these benefits under any collective bargaining agreement, but rather offered them on a "unilateral" basis, and did not require any employee contributions with respect to the benefits. *Id.* at 448. Even though the benefits at issue were not "bargained-for" in the sense that they had not been negotiated under a collective bargaining agreement or other contract, the court concluded that they fell within the scope of section 507(a)(4). Acknowledging that Congress enacted section 507(a)(4) to overrule *Embassy Restaurant*, the court stated:

> The controversy in this case is whether Congress meant to create a priority merely in the narrow factual setting present in the two [overruled] Supreme Court cases, as the trustee argues, or whether "contributions to employee benefit plans" should be read more broadly to cover plans that are not the product of collective bargaining and are not administered by a union, as Northwestern contends. The bankruptcy court ruled that the trustee's preferred construction was inconsistent with the language, legislative history, and underlying policies of § 507(a)(4), and that Northwestern's interpretation was correct. We agree.

Saco, 711 F.2d at 448.

The First Circuit examined the legislative history closely and found that "Congress' object in enacting § 507(a)(4) was to extend the 1898 Act's wage priority to new forms of compensation, such as insurance and other fringe benefits." 711 F.2d at 449. The court then rejected the trustee's argument that the unilateral nature of the insurance program precluded priority status, finding that "[i]nsurance is no less a fringe benefit because it is granted by an employer 'unilaterally' rather than being provided under the terms of a collective bargaining agreement. Nothing in the legislative history . . . suggests the contrary." *Id.* at 449. Similarly, the court rejected the trustee's argument that priority status was precluded on the ground that the insurance program was not a "wage substitute," stating: "We

see no merit in the trustee's . . . argument that the employees must have 'substituted' the fringe benefits for wages. Such substitution can normally be assumed, unless the employer is a philanthropist." *Id.* at 449.

Having focused the inquiry on whether the employees received a benefit, the First Circuit concluded that allowing a priority claim for insurance premiums, collectible by insurers, would implement the purpose of the statute:

> Neither do we see any reason to deny insurance companies the right to obtain the priority for premiums attributable to insurance plan fringe benefits. To allow the insurer to obtain its premiums through the priority would seem the surest way to provide the employees with the policy benefits to which they are entitled.

711 F.2d at 449.[7] The same reasoning applies with equal force in this case.

2. Revisions to section 507(a)(4), made after Congress heard testimony recommending changes to the text, demonstrate Congress's intent to give section 507(a)(4) a broad scope inclusive of employee benefit plans of the kind at issue here.

As proposed originally in 1973, the text of section 507(a)(4) read as follows:

> (a) General Order of Distribution. The proceeds of the estate shall be distributed in the following order:

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[7] Amicus NCCMP argues in support of Petitioner that "a bankrupt employer's employees would not have a claim for the unpaid premiums." NCCMP Br. at 15 n.12. This misses the point. If the premiums (i.e., the contribution by the employer) are paid, the employees are entitled to claim the benefits under the policy.

> (4) allowed claims for contributions to *pension, insurance, or similar employee benefit plans* to the extent that the claims arise from services rendered within one year before the date of the petition or the cessation of the debtor's business, whichever is earlier . . . .

Report of the Commission on the Bankruptcy Laws of the United States, proposed § 4-405, H.R. Doc. No. 137, pt. 2 (1973), *reprinted in* COLLIER ON BANKRUPTCY, App. 4(c) at 4-678 through 4-683 (emphasis supplied). In the notes accompanying this proposed text, the Commission stated that, under the proposed section (a)(4), "[t]he longstanding dispute as to whether fringe benefits should be considered wages is mooted." *Id.* at 4-680.[8]

Between 1973, when the above-quoted text was submitted to Congress, and 1978, when Congress enacted the final version of section 507(a)(4), Congress heard the testimony of several witnesses who were concerned that, as originally proposed, the scope of the statute covering "pension, insurance, or similar employee benefit plans" was too restrictive. As a result of this testimony, Congress changed the provision to remove any qualifying language, leaving only reference to "employee benefit plan" as it exists in the current statute. The changes made as a result of this testimony demonstrate that Congress intended a broad definition of "employee benefit plan," not the restrictive interpretation urged by Howard.

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[8] The proposed text was not limited to "fringe benefits," which are defined as "[(1)]an employment benefit (as a pension or a paid holiday) granted by an employer that has a monetary value but does not affect basic wage rates [(2)] any additional benefit." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 467 (10th ed. 2002) (emphasis supplied). Workers' compensation insurance benefits fall within the scope of this definition.

Among those who testified, one witness, Robert A. Georgine, Chairman of the National Coordinating Committee for Multiemployer Plans ("NCCMP"), suggested dropping the qualifying phrase "pension, insurance, or similar" so that subsection (a)(4) would more accurately reflect the scope of benefit programs being made available to employees:

> We would suggest . . . in view of the increased scope of employee benefit plans which exist today, and the corresponding amendments in Section 302(c) of the Labor-Management Relations Act authorizing contributions to such plans, that the phrase 'pension, insurance or similar employee benefit plans', which appears in Section 4-405(a)(4) of the Bills be changed so as not inadvertently to exclude certain other types of plans. Section 302(c) of the LMRA expressly recognizes the value to employees, and to the public at large, of certain programs or funds prominent in the construction and other industries. . . . We would therefore urge that the Bills merely refer to 'employee benefit plans' . . . .

Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary (the "Subcommittee Hearing Report"), 94th Cong. at 2452 (1976) (statement of Robert A. Georgine, AFL-CIO).[9] The same witness also testified: "[L]et me suggest that paragraph (4) of Section 4-405 be amended to parallel the definitions in ERISA. The contributions for which priority treatment should be granted should be any contributions to an employee benefit plan as defined in ERISA § 3(3). This will avoid what I believe is an

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[9] Mr. Georgine also testified as President of the Building and Construction Trades Department, AFL-CIO. *See* Subcommittee Hearing Report at 2451.

unintended ambiguity in the phrase 'similar employee benefit plans.'" *Id.* at 2455.

Beyond suggesting that the ERISA definition be incorporated into the statute, other witnesses brought more kinds of employee benefits and programs to the attention of Congress. Max Zimney, General Counsel, International Ladies Garment Workers Union, AFL-CIO, noted that, under the then-existing bankruptcy laws, "[t]here is no preferment whatsoever for that portion of the wage package devoted to health, welfare, pensions and other worker benefits" and that his goal was to seek congressional "help in correcting these serious legal, economic and sociological deficiencies." Subcommittee Hearing Report at 2421; *see also id.* at 2447 (testimony of Mr. Lawson, Assist. General Counsel, United Steelworkers of America, AFL-CIO) (discussion of worker "welfare" programs and societal need to protect workers). Mr. Zimney further testified:

> We turn now to Paragraph (a)(4). This Paragraph is defective in a number of respects. *First, its description of employee benefit plans is too narrow.* As presently stated, the Paragraph covers only "pension, insurance, or similar employee benefit plans." We submit that the word "similar," confined as it is by specific reference to "pension" and "insurance" plans, is restrictive language. *As now worded, the Paragraph may exclude other very worthy benefit plans which we believe were not intended for exclusion.* Some of the plans which may not be covered by the restrictive wording of the Bills are specifically authorized by Section 302(c) of the Labor-Management Relations Act, 1947 (29 U.S.C.A. § 186(c)), as fringe benefits subject to collective bargaining. They include benefit plans providing for scholarship, legal services, and child care centers; it is likely that 302's list of benefit plan[s] will continue to grow in the future, as it has in the past .... Moreover, Section 302's list of plans is not all-inclusive. *We therefore urge the Committee to adopt the term "employee benefit plans" which is the same term*

> *employed in the Pension Reform Act of 1974. (See Sections 3 and 4 thereof.) This would permit federal bankruptcy law protection now and in the future of all employee benefit plans, without the necessity of difficult, time-consuming legislative amendments.*

Subcommittee Hearing Report at 2424-25 (emphasis supplied).

In addressing the opportunity to change the law as it existed under *Embassy Restaurant*, Mr. Zimney stated:

> When finally such an opportunity presents itself, gentlemen, I suggest to you that we ought to do it right. That is what I am talking about. *First of all, your description of benefit plans is much too narrow. Whoever drew this provision, did not know enough about employee benefit plans.*
>
> You deal with pensions, insurance or similar employee benefit plans. Well, as lawyers know, the meaning of the word "similar" partakes of the words which precede it and the words which precede it are pension and insurance. I suggest to you that the bills may not be catching benefits like scholarships, prepaid legal plans, daycare centers, apprenticeship training and the like which are now part of . . . the Taft-Hartley Act. *As I said earlier, the benefit plan concept is an expanding one.*
>
> *I suggest to you that you ought to use the accordion phrase, "employee benefit plans." You ought not to confine yourself to particular types and rely on the word similar because I don't think that you open up employee benefit plans much beyond the words which precede the word "similar."*

Subcommittee Hearing Report at 2431-32 (emphasis supplied). In addition, Mr. Zimney, like Mr. Georgine, suggested that the statute use the same text as ERISA, stating: "I suggest use of the phrase found in ERISA . . . so that you may for now and in the

future embrace employee benefit plans, which I think is the intention of this section." *Id.* at 2432.

Mr. Jeffrey Gibbs, Counsel of the Industrial Union Department, AFL-CIO, testified:

> [W]e have seen a spectacular increase in governmental interest and support of Federal and State legislation and programs to increase the protection of the worker against the ravages of economic displacement. *Unemployment compensation laws and workmen's compensation laws have been enacted throughout the country, and benefits for those programs have been raised on a regular basis.*

Subcommittee Hearing Report at 2434 (emphasis supplied). Mr. Gibbs noted that these plans included, not just pension and health insurance plans, but those described as worker "welfare" plans as well. *Id.* Recognizing the expanding nature of the benefits being offered to workers, he testified:

> It is incredible to think that despite this fifty-year record of increasing concern for the economic welfare of the displaced worker, the changing structure of employee compensation, and the threefold increase in the cost of living, nothing has been done to make the coverage of the Federal Bankruptcy Act more responsive to the needs of the displaced employee.

Subcommittee Hearing Report at 2435. Mr. Gibbs also criticized the then-state of the law for excluding "deferred benefits such as pensions, health and welfare plans, sickness and accident, annuity, and life insurance benefits," and noted that a "narrow construction" of "employee benefit plans" would stand in contrast with expanding coverage under the "NLRA and other labor legislation," as well as "the regulations of the Cost of Living Council." *Id.* (noting congressional attempts to expand the statute's coverage).

In his testimony, Mr. Stanley Wisniewski, Research Director, Service Employees International Union, AFL-CIO, noted that fringe benefits and wage supplements included

"employer expenditures for retirement programs, health benefit programs, *unemployment benefit programs*, vacation and holiday benefit funds and savings and thrift plans." Subcommittee Hearing Report at 2443 (emphasis supplied).

As Congress moved closer to enacting section 507(a)(4), it modified the proposed text of section 507(a)(4) to eliminate any qualification to the concept "employee benefit plan" and the language of the House and Senate Reports accompanying the modified text recognized the increased scope of benefit and insurance plans being made available to employees. *See* H.R. Rep. No. 95-595, at 357 (1978) ("The priority granted [by section 507(a)(4)] is limited to claims for contributions to employee benefit plans such as pension plans, health or life insurance plans, *and others*."), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 (emphasis supplied); *id.* at 187, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6147-48 (noting increased availability of "fringe benefits"); S. Rep. No. 95-989, at 69 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5855 (1978). The House Report further states:

> [T]he [new legislation] establishes a new category, a fourth priority, immediately following the wage priority, for contributions and payments to employee benefit plans. This will include health insurance programs, life insurance plans, pension funds, and *all other forms of employee compensation that is not in the form of wages.*

H.R. Rep. No. 95-595, at 187 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6148 (emphasis supplied); *see also Howard Delivery*, 403 F.3d at 240 n. 1 (Shedd, J., concurring) (discussing congressional reports and stating that, "[u]nder this very broad language, workers' compensation would qualify as 'employee compensation that is not in the form of wages'") (quoting H.R. Rep. No. 95-595, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6148).

In sum, the testimony that Congress heard in considering proposed section 507(a)(4), and Congress's reaction to this testimony, evident in its revision of the proposed text, demonstrates that Congress intended the scope of the section to

include every type of employee benefit plan, not simply those of one kind or another; those that are "bargained-for" versus mandated by state law; or those that qualify only under some restrictive interpretation of a "fringe benefit." In particular, Congress heard testimony regarding employee benefits obtained through collective bargaining agreements; considered whether items such as scholarship programs, prepaid legal plans, day-care benefits and apprenticeship training should be included; and was asked to consider aspects of the Taft-Hartley Act, the Labor-Management Relations Act, and the regulations of the Cost of Living Council. Witnesses also referred to worker "welfare" programs as part of the discussions about worker benefits. *See* Subcommittee Hearing Report at 2421, 2447. In addition, witnesses discussed benefit plans required by state legislation, such as unemployment and workers' compensation, designed to protect "the worker against the ravages of economic displacement." *Id.* at 2434. Faced with all of this descriptive testimony, Congress did not limit the scope of section 507(a)(4) to any particular items or programs. Nor did Congress exclude programs directed by state law. Rather, Congress simply chose an "accordion phrase" -- "employee benefit plan" -- that could encompass all such plans. *Id.* at 2432. Congress then imposed a monetary limitation on claims allowed under the new statute. This demonstrates only that Congress intended the phrase "employee benefit plan" to have a broad meaning that encompasses precisely the kinds of benefits provided through workers' compensation insurance policies.

3. Judge Shedd properly concluded that Congress intended to include within the scope of section 507(a)(4) "employee benefit plans" as defined broadly under ERISA.

As noted, part of the testimony recommending that the scope of the original proposed text of section 507(a)(4) be expanded was from witnesses who suggested that Congress adopt in section 507(a)(4) the same definition of "employee benefit plan" as that used in ERISA. *See* Subcommittee Hearing Report at 2432 (Mr. Zimney stating: "I suggest use of the phrase

found in ERISA . . . so that you may for now and in the future embrace employee benefit plans, which I think is the intention of this section."); *id.* at 2455 (Mr. Georgine suggesting use of the ERISA definition to avoid "an unintended ambiguity"). Thereafter, Congress ultimately chose to use in section 507(a)(4) the same phrase -- "employee benefit plan" -- that is used in ERISA, under which the definition of "employee benefit plan" clearly includes workers' compensation benefits. *See* 29 U.S.C. §§ 1002(1), (3); *Howard Delivery*, 403 F.3d at 239-41 (Shedd, J., concurring).

Judge Shedd focused on these aspects of the legislative history in concluding "that Congress intended the phrase 'employee benefit plans' in the bankruptcy priority provision to have the same meaning that it has in ERISA." *Howard Delivery*, 403 F.3d at 240.[10] Given the evolution of the statutory text in light of the testimony discussed above, it is more than reasonable to infer that Congress intended workers' compensation insurance plans to be included within the scope of section 507(a)(4). *See, e.g., Allegheny Int'l*, 138 B.R. at 173-74; *cf. Morissette v. United States*, 342 U.S. 246, 263 (1952) ("Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.").[11]

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[10] Amicus NCCMP's argument that ERISA does not regulate state-run workers' compensation programs, *see* NCCMP Br. at 24-5, is misplaced. ERISA's regulation is irrelevant. At issue are ERISA's definitions. 29 U.S.C. § 1003(b)(3), cited by NCCMP, expressly includes workers' compensation programs mandated by state law within the scope of ERISA's definition of "employee benefit plans."

[11] Congress did not limit the scope of section 507(a)(4) by including a reference to ERISA.

CONCLUSION

As demonstrated above, the plain language of section 507(a)(4) includes premiums owed to an insurer for workers' compensation insurance. This reading of the statute also gives effect to its essential purpose. To the extent the Court deems the legislative history of section 507(a)(4) to be relevant, that history demonstrates that Congress removed all language of limitation from the text initially proposed in response to testimony expressing concern that the original provision was too restrictive. As the statute evolved, Congress expanded its scope to include precisely the types of benefits and claims at issue in this case. For the foregoing reasons, the Court should affirm the decision below.

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Dated: January 26, 2006

(3)

No. 05-128

DEC 22 2005

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HOWARD DELIVERY SERVICE, INC., Debtor, and the OFFICIAL COMMITTEE OF UNSECURED CREDITORS of HOWARD DELIVERY SERVICE, INC.,

Petitioners,

v.

ZURICH AMERICAN INSURANCE COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

The question presented is whether a claim by a creditor insurance company for unpaid workers' compensation insurance premiums constitutes "contributions to an employee benefit plan arising from services rendered" under section 507(a)(5) of the Bankruptcy Code, as amended, and is therefore entitled to priority status.

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INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS [1]

The National Coordinating Committee of Multiemployer Plans ("NCCMP") is a nonprofit, tax-exempt organization that has participated for thirty years in the development of employee benefits legislation and regulations promulgated to implement the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and other laws affecting multiemployer plans. Currently, approximately 600 multiemployer pension, welfare, and other Taft-Hartley plans[2] are affiliated with the NCCMP. These affiliated plans cover a majority of the participants of multiemployer plans throughout the nation and are representative of the multiemployer plan community generally. The NCCMP has frequently participated as *amicus curiae* in the United States Supreme Court and the federal courts of appeal.

Multiemployer benefit plans are funded by employer contributions set at rates established through collective bargaining between one or more unions and two or more signatory employers.[3] The contributions one employer makes to a multiemployer plan typically will help fund the benefits of other employers' active employees, inactive employees and retirees, as well as the benefits of that employer's active employees. Conversely, if one signatory employer fails to remit contributions on behalf of its covered employees, its employees as well as the employees of other employers will be impacted. The viability of multiemployer plans would be placed at great risk if Congress did not provide the trustees of

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby state that no counsel for Petitioner or Respondent authored any part of this brief. Moreover, no person or entity other than the NCCMP made a monetary contribution to the preparation or submission of this brief.

[2] Section 302(c) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 186(c).

[3] ERISA section 3(37), 29 U.S.C. § 1002(37).

these plans with an effective means of collecting delinquent employer contributions. Accordingly, on several notable occasions the NCCMP's participation in the legislative process has been instrumental in crafting federal laws that promote the expeditious enforcement of employer contribution obligations to multiemployer plans.

In 1980, the NCCMP was recognized by Senate cosponsors as having had a significant impact on the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), PUB. L. NO. 96-364, 94 STAT. 1208.[4] The MPPAA amended ERISA so as to improve substantially the recourse of multiemployer plan trustees against employers who fail to fulfill their obligation to make promised contributions. Congress recognized that the financial soundness and stability of multiemployer plans was being undermined by employer delinquencies to the direct detriment of the plans, their participants and beneficiaries, and those employers that honored their contribution obligations. *See Central States Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 581 n.22 (1985) (quoting the floor manager's statement during debate on the MPPAA concerning "the problems some employers create for multiemployer plans by not fully and promptly complying with their contribution obligations.").

Enactment of the MPPAA proved to be a major triumph for multiemployer plan trustees in their efforts to collect contributions from delinquent employers. Among other things, the MPPAA established an additional federal cause of action which may be brought by multiemployer plan trustees to enforce an employer's contribution obligations under the terms of a collective bargaining agreement. ERISA section 515, 29 U.S.C. § 1145. Moreover, in cases where multiemployer plan trustees prevail, the MPPAA requires the court

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[4] *See* 126 CONG. REC. S9835 (daily ed., July 21, 1980) and S10100 (daily ed., July 29, 1980).

to award the plan the unpaid contributions, interest on the unpaid contributions, liquidated damages and reasonable attorney's fees and costs. ERISA section 502(g)(2), 29 U.S.C. § 1132(g)(2).

Notwithstanding the MPPAA's incentives for timely payment of employer contributions, too often fund trustees are confronted with lengthy lists of delinquent employers. Many of these employers, overwhelmed by mounting debts, seek protection under the Bankruptcy Code. In the event of a delinquent employer's bankruptcy, any proceeding by the trustees of a multiemployer plan that had been or could be brought under ERISA for the collection of contributions would be subject to an automatic stay under Bankruptcy Code section 362, 11 U.S.C. § 362. As a consequence, the plan would join the ranks of the debtor's unsecured creditors. Depending on when a multiemployer plan's claim arose, the claim may be entitled to priority. In general, a claim for contributions arising from services rendered during the post-petition operation of the debtor's business may be treated as second priority administrative expenses under section 507(a)(2) of the Bankruptcy Code, as amended. A claim for contributions to the plan arising from services rendered within 180 days before the filing of the petition may be treated as a fifth priority claim under section 507(a)(5),[5] to the extent that claim is within the dollar limitations set forth in section 507(a)(5)(B). All unsecured prepetition claims not granted priority under section 507(a)(5) would be treated as general unsecured claims.

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[5] When originally enacted in 1978 under the Bankruptcy Reform Act of 1978, current section 507(a)(5) was codified as section 507(a)(4). After the Fourth Circuit issued its decision below, the President signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") Pub. L. No. 109-08, which made sweeping changes to the Bankruptcy Code. Among other things, BAPCPA amended the priorities in section 507(a). Citations in this brief to the Bankruptcy Code take into account the BAPCPA amendments.

In 1976, the NCCMP participated in Congress' effort to reform outdated provisions of the Bankruptcy Code which adversely impacted multiemployer plans, their participants and beneficiaries. Under the Bankruptcy Act of 1898, only claims for actual "wages and commissions" were subject to priority. 11 U.S.C. § 104(a) (*repealed* 1978). In *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29 (1959) and *Joint Industry Board v. United States*, 391 U.S. 224 (1968), the U.S. Supreme Court held that contributions owed by an employer to collectively bargained welfare and annuity funds were not entitled to "wage" or "commission" priority under § 104(a)(2). In 1978, Congress added what is now section 507(a)(5) of the Code in order to overrule these two cases and to "provide a qualified priority for 'fringe benefits.'" *In re Saco Local Dev. Corp.*, 711 F.2d 441, 448 (1st Cir. 1983) (*citing* H.R. Rep. No. 95-595 (1977); S. Rep. No. 95-989 (1978)).

On the specific issue of how best to address the adverse impact of *Embassy Restaurant* and *Joint Industry Board* on the growing number of the nation's employees participating in fringe benefit plans, Congress sought the views and opinions of the NCCMP, the AFL-CIO and other labor organizations. *See generally, Bankruptcy Act Revision Hearing on H.R. 31 and H. R. 32 Before the Subcommittee on Civil and Constitutional Rights of The House Comm. On the Judiciary*, 94th Congress 2421-2465 (1976) ("*Hearings on H.R. 31 and H.R. 32*"). Although the Chairman of the NCCMP "enthusiastically support[ed]" the two bills as drafted "insofar as they would revise the Bankruptcy Act so as to provide a priority, in the distribution of the assets of the bankrupt estate, to claims for employer contributions to employee benefit plans," the Chairman also expressed the opinion of the multiemployer plan community that neither bill "t[ook] into account the seriousness of the problem" facing multiemployer plans. *Hearings on H.R. 31 and H.R. 32*, 2455 (statement of Robert Georgine, Chairman, NCCMP).

In his separate concurring opinion below, Judge Shedd construed a brief excerpt of the NCCMP Chairman's testimony as implicitly endorsing a broad construction of "contributions to an employee benefit plan" that would include premiums owed by an employer to a provider of statutory workers' compensation insurance coverage.[6] *Howard Delivery Serv. Inc. v. Zurich Am. Ins. Co. (In re Howard Delivery Serv. Inc.)*, 403 F.3d 228, 239-240 (4th Cir. 2005) (*per curiam*) (Shedd, J. concurring). Contrary to Judge Shedd's understanding of the NCCMP's position, the views expressed by the NCCMP Chairman as well as those views expressed by other labor officials at the Hearings indicate that organized labor and the multiemployer plan community were concerned that the proposed bills, "may not be catching benefits like scholarships, prepaid legal plans, day-care centers, apprenticeship training and the like which are . . . part of section 302(c)(5) of the Taft-Hartley Act." *Hearings on H.R. 31 and H.R. 32*, 2432 (statement of Max Zimney, General Counsel, Int'l Ladies Garment Workers Union, AFL-CIO).[7] Moreover,

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[6] *See also* Brief of *Amici Curiae* American Assurance Company, Hartford Fire Insurance Company, and the Travelers Indemnity Company and its Affiliates in Support of Appellant at 22-23, Howard Delivery Serv., 403 F.3d 228 (4th Cir. 2005) ("Brief of Amici Am. Assurance et al.").

[7] LMRA § 302(c), 29 U.S.C. § 186(c), lists a number of exceptions to the general prohibition in § 302(a) and (b) of employer payment to employee representatives. Section 302(c)(5), (6), (7) and (8) of the LMRA exclude payments to "jointly-trusteed" trust funds established for the sole and exclusive benefit of employees and their families and dependents for the purpose of paying for "medical or hospital care, pensions on retirement or death of employees, compensation for injuries resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sick-ness insurance, or accident insurance . . . pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs, . . . scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or . . . child care centers for preschool and school age dependents of employees . . . or . . .

at no time did these witnesses suggest that the priority should embrace an insurance company's claims for unpaid workers' compensation insurance premiums.

Prior to the Fourth Circuit's *per curiam* decision in *Howard Delivery*, only the Ninth Circuit had construed section 507(a)(5) to accord priority to a claim for unpaid workers' compensation premiums. *Employers Ins. of Wausau, Inc. v. Plaid Pantries, Inc.*, 10 F.3d 605 (9th Cir. 1993). Since the Ninth Circuit issued its decision in *Plaid Pantries*, the Eighth, Tenth and Sixth Circuits have had the opportunity to consider this precise issue. All three circuit courts expressly reject the Ninth Circuit's reasoning and hold that unpaid prepetition premiums under various state workers' compensation schemes are not "contributions to an employee benefit plan." *Employers Ins. of Wausau v. Ramette (In re HLM Corp.)*, 62 F.3d 224, 227 (8th Cir. 1995); *State Ins. Fund v. Southern Star Foods, Inc. (In re Southern Star Foods)*, 144 F.3d 712, 716-717 (10th Cir.), *cert denied*, 525 U.S. 978 (1998); *Travelers Property Casualty Corp. v. Birmingham-Nashville Express, Inc. (In re Birmingham-Nashville Express, Inc.)*, 224 F.3d 511, 516-517 (6th Cir. 2000).

It is settled that the general theme of the Bankruptcy Code is "equality of distribution, [and] if one claimant is to be preferred over others. the purpose should be clear from the statute." *Nathanson v. N.L.R.B.*, 344 U.S. 25, 29 (1952). What *is* clear from section 507(a)(5) of the Bankruptcy Code is that "an unsecured claim for unpaid contributions to a [collectively bargained] employee benefit plan is entitled priority under [that provision]." *Birmingham-Nashville Express*, 224 F.3d at 514-515. Accordingly, to the extent there is any doubt about what other claims are entitled to priority under section 507(a)(5), the participants and beneficiaries of multi-

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for the purpose of defraying the costs of legal services for employees, their families, and dependents."

employer plans have a unique interest in ensuring that the priority not be available to claimants not clearly entitled to it, for to do so would "dilute[] the value of the priority for those creditors Congress intended to prefer." *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 953 (7th Cir. 1976).

Multiemployer plans routinely are forced to pursue claims for delinquent pension or health and welfare fund contributions from employers who have sought bankruptcy protection. In pursuing those claims in bankruptcy, trustees of multiemployer plans are aided by the priority treatment afforded by section 507(a)(5). By holding that workers' compensation carriers can be deemed "employee benefit plans" under this provision of the Bankruptcy Code, the court below is reducing the priority recovery that will be available for multiemployer plans under section 507(a)(5). The dollar amount of this adverse impact on multiemployer plans will vary from case to case, but in larger bankruptcies, it doubtless will amount to millions of dollars in reduced recovery to the plans.

Accordingly, the NCCMP, its constituent groups and the multiemployer plan community in general have a strong interest in urging the reversal of the decision below. The NCCMP contends that resolution by this Court of the conflict between a divided Fourth Circuit and the Ninth Circuit, on the one hand, and the Sixth, Tenth and Eighth Circuits, on the other, in a manner that follows the sound reasoning articulated by the latter three appellate courts adheres to Congress' intent of overruling *Embassy Restaurant* "by recognize[ing] the realities of labor contract negotiations, under which wage demands are often reduced if adequate fringe benefits are substituted." H.R.Rep. No. 95-595, at 357 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 (emphasis added). To effectuate Congress' intent, the priority should be construed narrowly to ensure that contributions owed to collectively

bargained plans are given the priority Congress sought to accord such claims.[8]

Both Petitioner and Respondent have consented to the filing of this brief, as is evidenced by letters of consent that have been filed with the Court.

SUMMARY OF ARGUMENT

A. When considered in the specific context in which it is used, and the broader context of the Bankruptcy Code as a whole, the unambiguous language "contributions to an employee benefit plan arising from services rendered" in section 507(a)(5) would not include unpaid premiums owing for a debtor's statutory workers' compensation liability insurance policy. Claims for contributions to an employee benefit plan under section 507(a)(5) must be read in conjunction with claims for wages and salaries under section 507(a)(4) of the Bankruptcy Code. These two priorities, unlike the other priorities listed in section 507(a), are subject to a single dollar limit. The priority of a wage claim is superior to a claim for employee benefit plan contributions in that the value of the latter claim is limited to the "unused portion" of the wage priority. In this way, an unsecured claim for contributions to an employee benefit plan arising from services rendered becomes a "wage substitute," but only to the extent an em-

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[8] We are mindful that a number of courts have extended the priority to include "plans that are not the product of collective bargaining and are not administered by a union. . ." *See Saco Local Dev. Corp.*, 711 F.2d at 448. The Court need not reach this issue to resolve the instant case. Nonetheless, the First Circuit in *Saco* embraces a rationale that supports the contention that a claim for employer premiums owed to a statutory workers' compensation liability insurance policy is not a priority claim under section 507(a)(5) because such premiums are not the "new forms of [employee] compensation" Congress vested with preferred treat-ment under that priority. *Id.* at 449. *See also Southern Star Foods*, 144 F.3d at 716-717 explaining that *Saco* "is not inconsistent" with the court's holding.

ployee's wage claim under section 507(a)(4) does not exceed $10,000. An employer's workers' compensation premium payment mandated by state law can-not be construed as a "wage substitute" even under the broadest understanding of that term. Moreover, any interpretation of "employee benefit plan" that would expand the class of unsecured creditor claims beyond those claims clearly understood to be covered under that priority contravenes the Bankruptcy Code's general theme of "equality of distribution." *See Nathanson*, 344 U.S. at 29.

B. Assuming the term "contributions to an employee benefit plan" is ambiguous as to whether it includes a claim by an insurance company for unpaid workers' compensation insurance premiums, the legislative history of section 507(a)(5) indicates that Congress did not intend to give a claim for unpaid workers' compensation premiums priority under that provision of the Bankruptcy Code. In his concurring opinion below, Judge Shedd concluded that specific legislative history serves as "direct indication" that Congress intended to give the term "employee benefit plan" in section 507(a)(5) the same meaning as Congress gave that term when it enacted ERISA. Judge Shedd apparently misread that legislative history. The NCCMP is the appropriate party to question his conclusion since Judge Shedd relies on the testimony of the NCCMP's former Chairman to establish this "direct indication" of legislative intent. To the contrary, the testimony of the Chairman of the NCCMP and that of four other witnesses representing the interests of organized workers indicate that the multiemployer plan community and organized labor sought to ensure claims for contributions owed any fringe benefit fund established in accordance with section 302(c) of the Taft-Hartley Act would be included in the priority and the priority itself would provide significant relief to low-wage employees who typically are exposed to the greatest hardship in the event their employer files for bankruptcy. It would be very strange indeed for the pre-eminent spokesman for multi-

employer plans to stand before Congress and urge the enactment of legislation that would significantly dilute the value of the priority accorded multi-employer plans.

ARGUMENT

A. PREMIUMS OWING FOR A DEBTOR'S STATUTORY WORKERS' COMPENSATION LIABILITY INSURANCE POLICY ARE NOT "CONTRIBUTIONS TO AN EMPLOYEE BENEFIT PLAN ARISING FROM SERVICES RENDERED" WITHIN THE SPECIFIC CONTEXT OF §507(a)(5) OR IN THE BROADER CONTEXT OF THE BANKRUPTCY CODE AS A WHOLE.

Of the three opinions below, only Judge King's relies exclusively on the "plain and unambiguous" meaning of the terms "contributions," "employee benefit plan," and "services rendered." *Howard Delivery Serv. Inc.* 403 F.3d at 234-235 (King, J. concurring). However, we respectfully contend that Judge King's reliance on selective dictionary definitions of "contributions," "benefits," and "plan"[9] without considering the specific context in which those terms are used or the broader context of the Bankruptcy Code as a whole was contrary to established rules of statutory interpretation. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Judge King's unorthodox effort to ascertain the meaning of statutory language by selecting "cherry-picked" dictionary definitions of statutory terms while giving little consideration to the statutory context of those terms ultimately led to an incorrect interpretation of section 507(a)(5). *Compare Robinson*, 519 U.S. at 341 ("At first blush, the term "employees" in § 704(a) [of Title VII of the Civil Rights Act of 1964] would seem to refer to those having an existing relationship with the

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[9] *Id.* at 235-236.

employer in question. . . This initial impression, however, does not withstand scrutiny in the context of § 704(a). . .").

It is conceivable that the term "contributions to an employee benefit plan arising from services rendered" in section 507(a)(5) *may* present under other circumstances ambiguities that require resort to legislative history, but that does not make the statute ambiguous on the point at issue in this case. *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004).

1. When considered in the specific context of sections 507(a)(4) and 507(a)(5), the language "contributions to an employee benefit plan arising from services rendered" means employer contributions made to fringe benefit plans which are generally understood to be wage substitutes.

The priority claim listed in section 507(a)(5) is unique in that it is the only priority claim that expressly references a preceding statutory priority. Moreover, it is the only priority claim with a dollar limit linked directly to the dollar limit of that preceding statutory priority. As a result, a section 507(a)(5) priority claim for contributions to employee benefit plans must be read in conjunction with a section 507(a)(4) priority claim for wages and salaries. As is relevant here, sections 507(a)(4) and (5) provide as follows:

> § 507. Priorities
>
> (a) The following expenses and claims have priority in the following order . . .
>
> (4) Fourth, allowed unsecured claims, but only to the extent of $10,000 for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for—

> (A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or
>
> (B) sales commissions earned by an individual or by a corporation . . .
>
> (5) Fifth, allowed unsecured claims for contributions to an employee benefit plan—
>
> (A) arising from the services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only
>
> (B) for each such plan, to the extent of—
>
> (i) *the number of employees covered by each such plan multiplied by $10,000, less*
>
> (ii) *the aggregate amount paid to such employees under paragraph (4)* of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

11 U.S.C. § 507(a)(4) and (5) (emphasis added).

The value of a wage priority claim under section 507(a)(4) is limited by two factors: time (180 days) and amount ($10,000). The Bankruptcy Code also limits by time and amount the value of priority claims for contributions to employee benefit plans. However, section 507(a)(5)(B) places an additional limit on claims for unpaid contributions to employee benefit plans. That limit is linked directly to the aggregate amount paid by the estate to employees under section 507(a)(4).

Collectively bargained employee benefits underscore the relationship between these two section 507(a) priorities.[10] In

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[10] Congress enacted section 507(a)(5) in the context of the collective bargaining process and the employer's concomitant contractual obligation

the context of collective bargaining, the term "wage and benefit package" is frequently used to describe the combined value of an employee's wages and fringe benefits. For example, a hypothetical union may negotiate a contract which provides a $3.75 increase over the prior contract's wage and benefit package. The contractual hourly wage rate may increase by $1.25 with the additional $2.50 allocated among a health and welfare fund, defined benefit pension fund, 401(k) plan and vacation fund.

In these terms, Congress' intent to link the wage and salary priority in section 507(a)(4) with the employee benefit plan contribution priority in section 507(a)(5) is easily inferred. By enacting section 507(a)(5), Congress acknowledged this "bundling" of wages and fringe benefit contributions, but limited the priority for fringe benefit contribution claims to the unused amount of the wage priority. Read together, sections 507(a)(4) and (a)(5) give the employee of a bankrupt employer a priority claim for wages not to exceed $10,000, and if the employee's wage claim is less than $10,000, any claim for contributions to an employee benefit plan may be added to the employee's wage claim to the extent that the sum of the two claims does not exceed $10,000. *See State Ins. Fund v. Mather (In re Southern Star Foods, Inc.)*, 210 B.R. 838, 842 (B.A.P. 10th Cir. 1997), *aff'd* 144 F.3d 712, *cert. denied*, 525 U.S. 978 (1998) (explaining that for purposes of statutory interpretation the relationship between the statutory caps in § 507(a)(5)(B) and §507(a)(4) indicates that Congress did not intend a claim for workers' compensation insurance premiums to be treated as a § 507(a)(5) priority).

A reasonable, albeit broader, reading of "contributions to an employee benefit plan" as used in section 507(a)(5) may embrace premium payments an employer makes to an insurance company in order to provide health care coverage to its

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to contribute to employee benefit funds sponsored by unions. *See infra.*, at 18-22.

workforce even though this employee benefit is not the subject of "bargaining." In *Saco*, the First Circuit considered the issue of whether an insurance company was entitled to priority payment of the bankrupt employer's employee group life, health, and disability insurance premiums notwithstanding the fact that this employer-provided fringe benefit was not the product of collective bargaining. In affirming the bankruptcy court's finding that the claim for premiums was a priority under section 507(a)(5), the court explained:

> Congress' object in enacting [§ 507(a)(5)] was to extend the . . . wage priority to new forms of compensation, such as insurance and other fringe benefits. Insurance is no less a fringe benefit because it is granted by an employer "unilaterally" rather than being provided under the terms of a collective bargaining agreement. . . . We see no merit in the trustee's related argument that the employees must have "substituted" the fringe benefits for wages. Such substitution can normally be assumed, unless the employer is a philanthropist. Regardless, here the bankruptcy court found that Saco used the insurance plan to attract employees, and . . . Saco was able to offer lower wages by "substituting" the noncontributory plan.

Saco, 711 F.2d. at 449. Thus, the court in *Saco* construed a priority claim for "insurance and other fringe benefits" provided by an employer as an *extension* of the section 507(a)(4) wage priority, not something independent or unrelated to wages.[11]

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[11] *Accord, Birmingham-Nashville Express*, 224 F.3d at 518 (While finding the term "employee benefit plan" in section 507(a)(5) is limited to wage substitutes, the court agreed with the First Circuit's holding in *Saco* that to qualify for that priority the wage substitute need not be the product of collective bargaining and may be payable to an insurance company); *but see Southern Star Foods*, 144 F.3d at 718 n.6 (refusing to reach the question of whether Congress intended third parties, such as insurance companies, to assert priority claims under § 507(a)(5)).

Even a broad reading of section 507(a)(5) must take into account the real link between wages, on the one hand, and fringe benefits that may be substituted for wages, on the other. In *Saco*, the First Circuit characterized this link as either a bargain or "a *de facto* 'bargain' in which employees accept[ ] lower wages that other firms pa[y] in return for a noncontributory [health] plan." *Saco*, 711 F.2d at 448. Nonetheless, a policy of insurance "issued to discharge the statutorily mandated *liability* of an employer for workplace injuries" stands in stark contrast to these bargains and *de facto* bargains between employers and their employees. *Howard Delivery Serv, Inc.*, 403 F.3d at 244 (Niemeyer, J. dissenting). *See, also, Birmingham-Nashville Express*, 224 F.3d at 517 ("Workers' compensation is not a wage substitute; rather, it is an award arising out of work-related injury owed by an employer. Consequently, . . . an [insurance company's] assertion of priority again must fail because workers' compensation insurance is not an 'employee benefit plan.'").[12]

Insurance companies providing workers' compensation coverage to employers may identify a number of policy arguments that suggest that the "unique nature of workers' compensation premiums entitles them to preferential treatment." *In re Arrow Carrier Corp.*, 154 B.R. 642, 646 (Bankr. D. N.J. 1993). Nevertheless, these reasons for special priority treatment do not overcome the unambiguous statutory language of sections 507(a)(4) and (a)(5), which limit claims

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[12] In addition, a bankrupt employer's employees would not have a claim for the unpaid premiums their employer owes its workers' compensation insurance carrier. Allowing the insurance company in this case "to have priority under [§ 507(a)(5)], a priority intended to benefit employees, is tantamount to subrogating the insurance company to the priority of the employees," which would appear to be impermissible under § 507(d) of the Bankruptcy Code . . . Pursuant to § 507(d), "an entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(5) . . . is not subrogated to the right of the holder of such claim to priority under such subsection." *See Southern Star Foods*, 210 B.R. at 842.

under the latter to fringe benefits that are substitutes for wages under the former.[13]

Moreover, to prioritize insurance companies' claims for workers' compensation premiums owed where they are not clearly entitled to such treatment "dilutes" the value of the priority for the claims of creditors Congress intended to elevate. For purposes of section 507(a)(5), Congress sought to elevate the claims of employees who are often the hardest hit by a company's demise. *See, e.g., In the matter of Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 658 F.2d 1149, 1163 (7th Cir. 1981) (citations omitted). In practical terms, Zurich American Insurance contends that the unambiguous language of section 507(a)(5) indicates that Congress intended to place an insurance company's claims for workers' compensation premiums on equal footing with claims asserted on behalf of employees for employer contributions owed to pension plans, 401(k) plans, medical funds and other fringe benefit plans that directly impact the health and welfare and future financial security of such employees and their dependents. *See Shapiro v. Saybrook Mfg. Co., (In re*

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[13] In *Arrow Carrier*, the U.S. Bankruptcy Judge rejected the insurance companies' policy arguments by noting that most creditors can assert similar policy arguments—

> [T]he insurance companies argue that preferential payment of their premiums is necessary to ensure the financial viability of the workers' compensation insurance industry. This argument, however, could easily be made by any creditor. In today's complex business marketplace, every business might necessarily have to rely on the prompt payment of bills to ensure its own financial stability. Yet, the very fact that the bankruptcy code exists is testament to the fact that businesses will sometimes not be in the position to satisfy their debts. Accordingly, the price to be paid in the marketplace for the type of service offered should be a reflection of the realities of doing business in a sometimes unpredictable business environment—where bankruptcy is a definite possibility.

Arrow Carrier, 154 B.R. at 646.

Saybrook Mfg. Co.,), 963 F.2d 1490, 1495-96 (11th Cir. 1992) ("Creditors within a given class are to be treated equally and bankruptcy courts may not create their own rules of superpriority within a single class." (citations omitted)).

Regardless of whether insurance companys can put forward compelling policy arguments on why their claims are worthier than those of other unsecured creditors, workers' compensation insurance payments are not wage substitutes. Accordingly, when considered within the specific context of sections 507(a)(4) and 507(a)(5), premiums for a statutory workers' compensation liability insurance policy should not be accorded priority under section 507(a)(5).

2. When considered in the broader context of the Bankruptcy Code, it would be contrary to that Statute's general theme to interpret the priority under § 507(a)(5) expansively.

There is no indication within the broader context of the Bankruptcy Code to suggest that claims by a creditor insurance company for unpaid workers' compensation insurance premiums should be accorded priority status under section 507(a)(5). To the contrary, "the fundamental principle running through all of the Bankruptcy Code is that creditors should generally be treated equally. . . [, and a]n obvious corollary to this principle is that if the claims of a class of creditors are to receive preferential treatment from the courts, the right to such treatment must have been authorized by Congress in clear and precise terms." *Birmingham-Nashville Express*, 224 F.3d at 515 (citing *Embassy Restaurant*, 359 U.S. at 31). *See also HLM Corp.*, 62 F.3d at 226 ("[T]he Code was promulgated to ensure the fair and uniform treatment of creditors. To that end, preferential treatment is given to unsecured creditors only in exceptional circumstances." (citations and internal quotations omitted)).

B. EVEN IF RESORT TO LEGISLATIVE HISTORY IS NECESSARY IN THIS CASE, "CONTRIBUTIONS TO AN EMPLOYEE BENEFIT PLAN" AS CONTEMPLATED BY CONGRESS DOES NOT ENCOMPASS PREMIUMS FOR WORKERS' COMPENSATION INSURANCE.

1. The legislative history of § 507(a)(5) is devoid of any suggestion that "contributions to an employee benefit plans arising from services rendered" would encompass any claims other than those claims for fringe benefits that serve as wage substitutes.

As discussed above, the Court need not resort to 507(a)(5)'s legislative history to interpret it. When, the Bankruptcy Code's "language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (citations omitted). Nevertheless, a review of section 507(a)(5)'s legislative history offers additional assurance in light of the split among the circuits. Moreover, in the instant case, a review of the statute's legislative history will serve the dual purpose of addressing certain arguments raised by *amici curiae* below which may have been persuasive to Judge Shedd as reflected in his concurring opinion.[14] As detailed below, the foundation of these arguments rests on an unreliable reading of the Congressional testimony of the NCCMP in 1976.

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[14] *See* note 6, *supra*, and *Howard Delivery Serv. Inc.*, 403 F.3d at 239-240 (Shedd, J. concurring).

Undoubtedly Congress enacted what is now Bankruptcy Code section 507(a)(5) to overrule *Embassy Restaurant.*[15] Moreover, the legislative history relating to the priority reveals that for many years Congress deliberated over the issue of how negotiated fringe benefits should be treated in the aftermath of *Embassy Restaurant* and *Joint Industry Board.*[16] On this point, legislative history of section 507(a)(5) portrays a Congress that considered a new priority for fringe benefits as one of several amendments to the Bankruptcy Code which together could work to reinvigorate the Code's wage priority. By 1973, it had become apparent to many members of Congress that wage inflation over time, robust growth of fringe benefit plans and the Supreme Court's restrictive interpretation of "wages" under the wage priority provision had rendered the relief under the Code's wage priority "nearly meaningless." S. Rep. No. 95-989, at 69

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[15] While Congress noted Justice Black's observation that it is hard to see how employer contributions to a union welfare fund "could not be 'wages' [since] the "payments are certainly not gifts" (359 U.S. at 37 (Black, J. dissenting)). it also acknowledged the evolution and growth of fringe benefit funds:

> When the wage priority was last amended in 1926, perhaps the intent of Congress was not to extend it. . . , because fringe benefits were little heard of at the time. Now, however, to ignore the reality of collective bargaining that often trades wage dollars for fringe benefits does a severe disservice to those working for a failing enterprise.

H.R.Rep. No. 95-595, at 187 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6148.

[16] In declining to overrule *Embassy Restaurant,* the Court in *Joint Industry Board*, reasoned that the matter should be left to Congress, "which has not infrequently given attention" to the priorities it created under the predecessor of § 507(a). "Although the section was completely re-enacted in 1967, . . . [the wage priority] was left unchanged despite the fact that in every Congress since *Embassy Restaurant* bills have been introduced to overrule or modify the result reached in that case." *Joint Indus Bd.*, 391 U.S. at 228.

(1978), *reprinted in* 1978 U.S.C.C.A.N. 5787 at 5855. In its 1973 report to the House of Representatives, the Commission on the Bankruptcy Laws of the United States explained the reasoning underlying a proposed new priority for fringe benefits:

> With respect to claims for wages, which are given a second priority by the present Act as well as the proposed Act, the Commission recommends . . . that the amount of such allowable priority be substantially increased and that it include an amount relating to fringe benefits which under the present law are denied priority as "wages." The employees of a business are ordinarily the ones who suffer most by its bankruptcy and are the ones who are least able, among the creditors, to protect themselves against that eventuality. Therefore, the Commission recommends that the employees be given a substantial priority of payment in preference to all other creditors except those having claims for administrative expenses. . . This principle has always been recognized in the Bankruptcy Act but the present limitation of the amount of the wage priority to $600 per employee, which was set in 1926, does not adequately take account of the inflation that has ocurred since that time. Also, the decision of the Supreme Court that pension fund contributions and other similar fringe benefits are not entitled to any priority (because not "wages") does not adequately recognize the current nature of the "wage package."
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> . . . . The justification for this departure from the general rule of equality is that most wage claimants are solely dependent on their earnings for support of their families and themselves . . . For the same reason as that justifying a priority for wages paid directly to the employee, the Commission also recommends that the priority be extended to include fringe benefits. Fringe benefits are now considered part of the basic wage package that an employee receives from his employer. . . Union nego-

> tiators agree to smaller direct wages in exchange for greater fringe benefits.

Report of the Commission of the Bankruptcy Laws of the United States July 1973, H.R. Doc. No. 137. (1973); *see also* S. Rep. No. 95-989, at 69 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787 at 5855 (1978) (Section 507(a)(4) "overrules *United States v. Embassy Restaurant*. . . . The bill recognizes the realities of labor contract negotiations, where fringe benefits may be substituted for wage demands. The priority is limited to claims for contributions to employee benefit plans such as pension plans, health and life insurance plans, and others, arising from services rendered. . .").

The legislative history of the recently enacted Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") again evidences Congress' ongoing efforts to revise the Bankruptcy Code to provide greater protection to employee wages and wage substitutes. In 2003, Representatives Cannon and Delahunt introduced an amendment to the bill to "provide heightened protections to employees by increasing the monetary cap on wage and employee benefit claims that are entitled to priority under the Bankruptcy Code from $4,650 to $10,000." 149 Cong. Rec. H1986 (2003) (statement of Rep. Delahunt). Any suggestion that the Congressmen introducing this amendment had any inkling that the amendment (or the existing statutory priority) could also provide relief to workers' compensation insurance carriers is belied by Representative Delahunt's comments:

> [B]y increasing the monetary cap on wage and employee benefit claims . . . the amendment increases the likelihood that lower-wage workers would get back *some of the money they are owed*. . . . I am pleased to join . . . Mr. Cannon in offering this amendment. It would restore a modicum of balance to this unfair, unbalanced bill. The sponsors of the bill say they advocate personal responsibility. Yet the bill does nothing to curb the corporate abuses that have turned the Bankruptcy Code into

> a bonanza for a handful of unscrupulous executives. It does nothing to stop corporate insiders from stripping their companies of their assets, paying themselves exorbitant salaries and bonuses and leaving little or nothing for their workers. It does nothing to compensate workers whose *jobs, pensions, health insurance and life savings* have been wiped out by corporate bankruptcies. The amendment represents a first, modest, effort to restore some balance. To recognize the obligations that an enterprise owes to the working people who have labored to build and sustain it. The amendment will increase the chances that *employees and retirees whose companies collapse into bankruptcy are able to retrieve some portion of what they are owed for back wages and benefits.*

149 Cong. Rec. H2052-2053 (2003) (statement of Rep. Delahunt) (emphasis added).[17]

Since Congress first considered adding a priority for "contributions to employee benefit plans arising from services rendered," it has consistently characterized claims under this priority as wage substitutes an employer owes its employees. By contrast, at no time has Congress indicated any interest in distinguishing between premium claims of workers' compensation insurance carriers and claims of other unsecured creditors.

2. It is inappropriate to use the ERISA definition of "employee benefit plan" as an interpretive aid.

In the proceedings below several insurance companies, as *amici curiae* in support of Zurich, suggested that certain testimony before the Subcommittee on Civil and Constitutional Rights of the House Committee of the Judiciary may have persuaded lawmakers to expand the meaning of "employee

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[17] The Cannon-Delahunt amendment was ultimately incorporated into the BAPCPA.

benefit plan" so as to make the term "unqualified." *Amici curiae* also noted that definitions of "employee welfare plan" in ERISA section 3(1) and "employee benefit plan" in ERISA section 3(2) (29 U.S.C. §§1002(1) and (3)) may be used as guidance for determining the meaning of "employee benefit plan" for purposes of section 507(a)(5). *See* Brief of *Amici* Am. Assurance et al. at 22-23 n.4. In his concurring opinion, Judge Shedd took this contention one step further, finding "a direct indication from the legislative history that Congress intended to give this particular term the same meaning that it had given to that same term just four years earlier when it enacted ERISA. *Howard Delivery Serv.* 403 F.3d at 240 (Shedd, J. concurring). We respectfully contend that the *amici curiae* and Judge Shedd have misconstrued the testimony given the House Subcommittee in 1976 and that a proper understanding of that testimony shows that the interested parties that testified before Congress twenty-nine years ago would have strongly objected to any proposal that would result in the dilution of priority claims made by collectively bargained fringe benefit plans.

For sound reasons, the notion that ERISA's definition of "employee benefit plan" should be read into section 507(a)(5) of the Bankruptcy Code has been rejected by most courts. *See Birmingham-Nashville Express*, 224 F.3d at 517 (stating that most federal courts have rejected the view that ERISA "is of some use in construing section [507(a)(5)]); *Southern Star Foods*, 144 F.3d at 714 ("We decline to read the ERISA definition of 'employee benefit plan' into the Bankruptcy Code"). "[T]he ERISA definition and associated court guidelines were designed to effectuate the purpose of ERISA, not the Bankruptcy Code." *HLM Corp.*, 62 F.3d at 226 (citations omitted).[18]

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[18] *Cf., United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996) (declining to apply usage of term in Internal Revenue Code to term in Bankruptcy Code, absent some Congressional indication).

Even when dealing with issues solely within the scope of ERISA, the statutory definition of "employee benefit plan" must be considered in the context of ERISA's purpose. *See Fort Halifax Packing Co., v. Coyne*, 482 U.S. 1, 8-9 (1987) ("Attention to purpose is particularly necessary in this case because the terms "employee benefit plan" and "plan" are defined only tautologically in the statute. . ."). As explained in *Fort Halifax Packing*, an important policy underlying ERISA is the establishment of a uniform national treatment of employee benefit plans. *Id.* at 9. Statements by ERISA's sponsors emphasized the Act's sweeping preemptive effect on state law:

> It should be stressed that with *the narrow exceptions specified in the bill*, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans.

Id. (quoting Senator Williams, 120 Cong. Rec. 29197 at 29933 (emphasis added)). ERISA's legislative history indicates that while the Act's definition of "employee benefit plan" may be read broadly, the narrow exceptions to the Act's coverage should not be ignored. Consequently, Judge Shedd's apparent incorporation of ERISA's definition of "employee benefit plan" into the Bankruptcy Code without consideration of ERISA section 4(b)(3), 29 U.S.C. § 1003(b)(3), which excludes plans maintained solely for the purpose of complying with applicable workmen's compensation laws from coverage under ERISA, appears especially unpersuasive in light of repeated admonishments by the courts cautioning against expansive interpretations of the Bankruptcy Code's enumerated priorities.

To avoid this apparent inconsistency, Judge Shedd and *amici curiae*, contend that the legislative history of section 507(a)(5) gives direct indication that ERISA's definition

should be incorporated into the statute. The specific legislative history at issue concerns the testimony of the former Chairman of the NCCMP given two years prior to the enactment of the priority. The testimony Judge Shedd identifies is the statement of of Robert Georgine, who in addition to being Chairman of the NCCMP in 1976 was also President of the Building and Construction Trades Department of the AFL-CIO. Mr. Georgine, along with four other representatives of organized labor testified before the House Subcommittee on Civil and Constitutional Rights,[19] and each witness brought with him a broad understanding of the ill effects bankruptcy had on participants and beneficiaries of collectively bargained benefit funds. For example, General Counsel for the International Ladies Garment Workers Union stated:

> In apparel and other industries in which small marginal producers occupy a central role, business failures normally occur at an alarming rate. . . . The degree of harm must not be minimized. It runs into millions of dollars. A substantial portion of the wage delinquency represents benefit fund contributions of firms in federal bankruptcy proceedings; and because of the federal law's failure to accord priority treatment to benefit fund contributions, this large sum of money is virtually unrecoverable. . . . These losses to health, welfare, pension, severance and other funds are directly attributable to the failure of the federal bankruptcy law to accord a wage priority to benefit fund contributions.

Hearings on H.R. 31 and H.R. 32, at 2422 (statement of Max Zimney). *See also Id.* at 2435 (Statement of Jeffrey Gibbs, Industrial Union Department AFL-CIO); *Id.* at 2443-2445 (Statement of Stanley Wisniewski, Research Director, Service Employees International Union); *Id.* at 2446-2447 (Statement

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[19] We have found no evidence in the legislative history that any representative of the insurance industry testified before Congress on the subject of the "employee benefit plan" priority.

of A.E. Lawson, Assistant General Counsel, United Steelworkers of America).

Nevertheless, Judge Shedd and *amici* accurately note that Robert Georgine urged the Subcommittee to give "employee benefit plan" in the Bankruptcy Code the same definition prescribed in ERISA. However, neither Judge Shedd nor *amici* suggest that by making such a recommendation the Chairman of the National Coordinating Committee for *Multiemployer Plans* sought to have insurance companies partake in the limited priority Congress would ultimately provide his membership. Indeed, Mr. Georgine's testimony indicates that he was concerned solely with ensuring that all collectively bargained wage substitutes in the form of contributions to trust funds established pursuant to section 302(c) of the LMRA were covered within the priority:

> We would suggest . . . in view of the increased scope of employee benefit plans which exist today, and the corresponding amendments in Section 302(c) of the Labor-Management Relations Act authorizing contributions to such plans, that the phrase "pension, insurance or *similar* employee benefit plans," which appears in [both] of the Bills be changed so as not inadvertently to exclude certain other types of plans. Section 302(c) of the LMRA expressly recognizes the value of employees, and the public at large, of certain programs or funds prominent in the construction and other industries. I am referring, for example, to joint apprenticeship and training programs or other training programs; trust funds established for the purposes of scholarships for employees and their families to study at educational institutions; child care centers for dependents of employees; and legal service programs. We would therefore urge that the Bills merely refer to "employee benefit plans", and give that phrase a broad definition such as appears in § 3 of [ERISA].

Id. at 2452.

Mr. Georgine's reference to ERISA's definition of employee benefit plan should be put in perspective. In 1976 ERISA was in its infancy, and for those like Mr. Georgine, this new comprehensive statute would still be understood within the context of the Welfare and Pension Plan Disclosure Act of 1958[20] ("WPPDA"), the statute ERISA superseded. Like ERISA, the WPPDA included a definition of "employee welfare benefit plan" which was quite similar to ERISA's definition of that term, with one significant exclusion; unlike ERISA's definition, it did not reference LMRA section 302(c) funds. Conversely, the language in ERISA section 4(b)(3), which excludes from the Act's coverage plans "maintained solely for the purpose of complying with workmen's compensation law," is identical to WPPDA section 4(b)(2). Accordingly, it is likely that the intent of the Mr. Georgine's reference to the newly enacted ERISA was to encourage Congress to include in the proposed priority multiemployer fringe benefit plans other than traditional pension and insurance plans.

For any of these representatives of organized labor and collectively bargained plans knowingly to lobby Congress on behalf of workers' compensation insurance providers on this issue is preposterous. Such a position stands in direct conflict with the interests of union members and collectively bargained plans that no doubt would be harmed by any dilution of the proposed priority.[21]

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[20] Public Law 85-836, 85th Cong. (Aug. 28, 1958)

[21] But one need not rely solely on the strong inference that witnesses before Congress generally do not testify against the interests of those they represent. Included in Mr. Georgine's written statement was an exhibit in the form of a table of hourly wage rates and employer insurance, pension, vacation and other fund payments prepared by the Department of Labor. Apparently, this table was overlooked by *amici curiae*. The table lists four components of employer contributions in addition to basic laborer wage rates—"Insurance," "Pension," "Vacation pay" and "Other". Under the definitions set forth in the table's notes, an employer's payment of

3. Other federal statutes designed to effectuate a purpose akin to the purpose articulated by Congress when enacting section 507(a)(5) are effective interpretive aids for determining the intent of Congress.

Although ERISA may not be an appropriate source for defining "employee benefit plan" under section 507(a)(5) of the Bankruptcy Code, that should not foreclose the courts from considering other federal laws designed to effectuate purposes akin to those which underlie the wage and employee benefit priorities of sections 507(a)(4) and (5). Such statutes may provide valuable insight into how Congress sought to protect real wages as employee fringe benefits became a larger and larger component of many workers' overall wage packages. By first establishing a priority for employee wages and subsequently establishing one for fringe benefits, Congress was acting to protect workers who are especially at risk in the event their employer files for bankruptcy. For similar reasons, Congress enacted the Davis-Bacon Act[22] "to protect employees from substandard earnings by fixing a floor under wages on Government projects." *Walsh v. Schlecht*, 429 U.S. 401, 411 (1977) (quoting *United States v. Binghamton Const. Co.*, 347 U.S. 171, 176-177 (1954)). In 1964, Congress amended the Davis-Bacon Act to "bring the United States' wage practices 'into conformity with modern wage practices.'" *Morrison-Knudsen Construction Co. v. Dir., Office of Workers' Compensation Programs, U.S. Dep't of Labor*, 461 U.S. 624, 632-633 (1983) (quoting S. Rep. No.

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workers' compensation premiums would not be included as Insurance, Pension or Vacation pay. Moreover, note 4 of the Table provides that "Other" "[i]ncludes all other *nonlegally* required employer contributions, except for apprenticeship fund payments." Hear-ings on H.R. 31 and 32, 2462, 2463, n.1–4 (exhibit to statement of Robert Georgine (emphasis added)).

[22] 40 U.S.C. § 3141 *et seq*.

963, 88th Cong., 2d Sess., 1 (1964)). Specifically, the Davis-Bacon Act was amended in 1964 to incorporate fringe benefits into prevailing wage determinations. However, employer payments mandated by federal, state or local law were excluded." Accordingly, section 1(2) of the Davis-Bacon Act provides that "prevailing wages" include—

> (A) the basic hourly rate of pay; and
>
> (B) for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the forgoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying the costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, *but only where the contractor or subcontractor is not required by other federal, state, or local law to provide any of those benefits. . .*

40 U.S.C. § 3141(2) (emphasis added).[23]

The purpose underlying the exclusion of benefits required by federal, state or local laws in the Davis-Bacon Act is apparent. Congress recognized that these employer payments are not wage substitutes and should not be used by one contractor to offset the contributions another contractor may pay on behalf of its employees to bona fide fringe benefit plans. To permit contractors to offset *their* payment obligations under federal, state and local laws, would offend the purpose of the statute by artificially deflating employees' actual wage packages. Similarly, to permit an insurance company to assert a priority claim under section 507(a)(5) of the Bankruptcy Code, where the intent of such priority was to

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[23] Chapter 15 of The Department of Labor's Field Operations Handbook (June 29, 1990) details how the Department is to compute hourly fringe benefit equivalents. Section 15f11(h) of Chapter 15 expressly provides that an employer "may not take credit for any benefit required by law, such as social security contributions or *workers compensation*."

provide relief to wage claimants who are solely dependent on their earnings for support of their families and themselves, offends Congress' well-documented intent when enacting 507(a)(5).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HOWARD DELIVERY SERVICE, INC., ET AL. *v.* ZURICH AMERICAN INSURANCE CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 05–128. Argued March 21, 2006—Decided June 15, 2006

The Bankruptcy Code accords priorities, among unsecured creditors' claims, for unpaid "wages, salaries, or commissions," 11 U. S. C. §507(a)(4), and for unpaid contributions to "an employee benefit plan," §507(a)(5). Petitioner Howard Delivery Service, Inc. (Howard), was required by each State in which it operated to maintain workers' compensation coverage to secure its employees' receipt of health, disability, and death benefits in the event of on-the-job accidents. Howard contracted with respondent Zurich American Insurance Co. (Zurich) to provide this insurance for Howard's operations in ten States. After Howard filed a Chapter 11 bankruptcy petition, Zurich filed an unsecured creditor's claim for some $400,000 in premiums, asserting that they qualified as "contributions to an employee benefit plan" entitled to priority under §507(a)(5). The Bankruptcy Court denied priority status to the claim, reasoning that because overdue premiums do not qualify as bargained-for benefits furnished in lieu of increased wages, they fall outside §507(a)(5)'s compass. The District Court affirmed, similarly determining that unpaid workers' compensation premiums do not share the priority provided for unpaid contributions to employee pension and health plans. A Fourth Circuit panel reversed without agreeing on a rationale.

Held: Insurance carriers' claims for unpaid workers' compensation premiums owed by an employer fall outside the priority allowed by §507(a)(5). Although the question is close, such premiums are more appropriately bracketed with liability insurance premiums for, *e.g.*, motor vehicle, fire, or theft insurance, than with contributions made for fringe benefits that complete a pay package, *e.g.*, pension plans and group health, life, and disability insurance, which undisputedly

are covered by §507(a)(5).

United States v. *Embassy Restaurant, Inc.*, 359 U. S. 29, 29–35, and *Joint Industry Bd. of Elec. Industry* v. *United States*, 391 U. S. 224, 228–229, held that an employer's unpaid contributions to collectively-bargained plans providing, respectively, life insurance and annuity benefits to employees did not qualify as "wages" entitled to priority status under the prior bankruptcy law. Congress thereafter enacted what is now §507(a)(5) in order to provide a priority for the kind of fringe benefits at issue in those cases. Notably, Congress did not enlarge the "wages, salaries, [and] commissions" priority, §507(a)(4), to include fringe benefits, but instead created a new priority, §507(a)(5), one step lower than the wage priority. The new provision allows a plan provider to recover unpaid premiums—albeit only after the employees' claims for "wages, salaries, or commissions" have been paid. The current Code's juxtaposition of the wages and employee benefit plan priorities manifests Congress' comprehension that fringe benefits generally complement, or substitute for, hourly pay. Congress tightened the linkage of §507(a)(4) and (a)(5) by imposing a combined cap on the two priorities, currently set at $10,000 per employee. See §507(a)(5)(B). Because §507(a)(4) has a higher priority status, all claims for wages are paid first, up to the $10,000 limit; claims under §507(a)(5) for benefit plan contributions can be recovered next up to the remainder of the $10,000 ceiling. No other §507 subsections are so joined together.

Apart from the clues provided by *Embassy Restaurant*, *Joint Industry Bd.*, and the textual ties binding §507(a)(4) and (5), Congress left undefined the §507(a)(5) terms, "*contributions* to an *employee benefit plan* . . . arising from *services rendered*." (Emphases added.) Maintaining that §507(a)(5) covers more than wage substitutes like the ones at issue in *Embassy Restaurant* and *Joint Industry Bd.*, Zurich urges the Court to borrow the encompassing definition of employee benefit plan contained in the Employee Retirement Income Security Act of 1974 (ERISA): "[A]ny plan, fund, or program [that provides] its participants . . . through the purchase of insurance or otherwise, . . . benefits in the event of sickness, accident, disability, [or] death." 29 U. S. C. §1002(1). Federal courts have questioned whether ERISA is appropriately used to fill in blanks in a Bankruptcy Code provision, and the panel below parted ways on this issue. In any event, ERISA's signals are mixed, for §1003(b)(3) specifically exempts from ERISA's coverage the genre of plan here at issue, *i.e.*, one "maintained solely for the purpose of complying with applicable work[ers'] compensation laws." That exemption strengthens the Court's resistance to Zurich's argument. Rather, the Court follows *United States* v. *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U. S.

213, 219, in noting that "[h]ere and there in the Bankruptcy Code Congress has included specific directions that establish the significance for bankruptcy law of a term used elsewhere in the federal statutes." *Id.*, at 219–220. No such directions are contained in §507(a)(5), and the Court has no warrant to write them into the text.

This case turns instead on the essential character of workers' compensation regimes. Unlike pension plans or group life, health, and disability insurance—negotiated or granted to supplement, or substitute for, *wages*—workers' compensation prescriptions modify, or substitute for, the common-law tort *liability* to which employers were exposed for work-related *accidents*. Workers' compensation regimes provide something for employees, assuring limited fixed payments for on-the-job injuries, and something for employers, removing the risk of large judgments and heavy costs in tort litigation. No such trade-off is involved in employer-sponsored fringe benefit plans. Moreover, employer-sponsored pension and health plans characteristically insure the employee (or his survivor) only. In contrast, workers' compensation insurance shields the insured enterprise. When an employer fails to secure workers' compensation coverage, or loses coverage for nonpayment of premiums, an affected employee's remedy would not lie in a suit for premiums that should have been paid to a compensation carrier. Instead, employees who sustain work-related injuries commonly have recourse to a state-maintained fund or are authorized by state law to pursue the larger recoveries successful tort litigation ordinarily yields. Further distancing workers' compensation and fringe benefits, nearly all States require employers to participate in workers' compensation, with substantial penalties, even criminal liability, for failure to do so. It is relevant, although not dispositive, that States overwhelmingly prescribe and regulate insurance coverage for on-the-job accidents, while commonly leaving fringe benefits to private ordering.

Zurich's argument that according its claim a §507(a)(5) priority will give workers' compensation carriers an incentive to continue coverage of a failing enterprise, thus promoting rehabilitation of the business, is unpersuasive. Rather than speculating on how such insurers might react were they to be granted a §507(a)(5) priority, the Court is guided by the Bankruptcy Code's objective of securing equal distribution among creditors, see, *e.g.*, *Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224, 227, and by the corollary principle that preference provisions must be tightly construed, see, *e.g.*, *id.*, at 227. Cases like Zurich's are illustrative. The Bankruptcy Code caps the amount recoverable for contributions to employee benefit plans. Opening the §507(a)(5) priority to workers' compensation carriers could shrink the amount available to cover unpaid contributions to plans paradigmatically qualifying as wage

surrogates, primarily pension and health benefit plans. Pp. 5–16.

163 F. 3d 228, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, THOMAS, and BREYER, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which SOUTER and ALITO, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 05–128

HOWARD DELIVERY SERVICE, INC., ET AL., PETITIONERS *v.* ZURICH AMERICAN INSURANCE CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 15, 2006]

JUSTICE GINSBURG delivered the opinion of the Court.

The Bankruptcy Code accords a priority, among unsecured creditors' claims, for unpaid "wages, salaries, or commissions," 11 U. S. C. A. §507(a)(4)(A) (Supp. 2006), and for unpaid contributions to "an employee benefit plan," §507(a)(5).[1] It is uncontested here that §507(a)(5) covers fringe benefits that complete a pay package—typically pension plans, and group health, life, and disabil-

[1] All references to provisions of the Bankruptcy Code use the current numbering. At the time respondent Zurich American Insurance Company (Zurich) claimed priority treatment for unpaid workers' compensation premiums, the relevant subsections were numbered (a)(3) (wages) and (a)(4) (employee benefit plans). The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109–8, §212(2), 119 Stat. 51, altered the priority list so that (a)(3) became (a)(4), and (a)(4) became (a)(5). The only other statutory change relevant here concerns the dollar amount accorded priority status under current §507(a)(4) and (a)(5). When Zurich filed its proof of claim, the total sum allowed under those two subsections was $4,650 for each employee, see note following 11 U. S. C. §104 (2000 ed., Supp. III). That ceiling has since been raised, pursuant to §104, to $10,000 per employee. 11 U. S. C. A. §507(a)(5)(B)(i) (Supp. 2006).

ity insurance—whether unilaterally provided by an employer or the result of collective bargaining. This case presents the question whether the §507(a)(5) priority also encompasses claims for unpaid premiums on a policy purchased by an employer to cover its workers' compensation liability. We hold that premiums owed by an employer to a workers' compensation carrier do not fit within §507(a)(5).

Workers' compensation laws assure that workers will be compensated for work-related injuries whether or not negligence of the employer contributed to the injury. To that extent, arrangements for the payment of compensation awards might be typed "employee benefit plan[s]." On the other hand, statutorily prescribed workers' compensation regimes do not run exclusively to the employees' benefit. In this regard, they differ from privately ordered, employer-funded pension and welfare plans that, together with wages, remunerate employees for services rendered. Employers, too, gain from workers' compensation prescriptions. In exchange for no-fault liability, employers gain immunity from tort actions that might yield damages many times higher than awards payable under workers' compensation schedules. Although the question is close, we conclude that premiums paid for workers' compensation insurance are more appropriately bracketed with premiums paid for other liability insurance, *e.g.*, motor vehicle, fire, or theft insurance, than with contributions made to secure employee retirement, health, and disability benefits.

In holding that claims for workers' compensation insurance premiums do not qualify for §507(a)(5) priority, we are mindful that the Bankruptcy Code aims, in the main, to secure equal distribution among creditors. *See Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224, 227 (1930); *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, 451 (1937). We take into account, as well, the complementary principle that prefer-

ential treatment of a class of creditors is in order only when clearly authorized by Congress. See *Nathanson* v. *NLRB*, 344 U. S. 25, 29 (1952); *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29, 31 (1959).

I

Petitioner Howard Delivery Service, Inc. (Howard), for many years owned and operated a freight trucking business. Howard employed as many as 480 workers and operated in about a dozen States. Each of those States required Howard to maintain workers' compensation coverage to secure its employees' receipt of health, disability, and death benefits in the event of on-the-job accidents. Howard contracted with Zurich to provide this insurance for Howard's operations in ten States.

On January 30, 2002, Howard filed a Chapter 11 bankruptcy petition. Zurich filed an unsecured creditor's claim in that proceeding, seeking priority status for some $400,000 in unpaid workers' compensation premiums. In an amended proof of claim, Zurich asserted that these unpaid premiums qualified as "[c]ontributions to an employee benefit plan" entitled to priority under §507(a)(5). App. 32a.[2] The Bankruptcy Court denied priority status to Zurich's claim, reasoning that the overdue premiums do not qualify as bargained-for benefits furnished in lieu of increased wages, hence they fall outside §507(a)(5)'s compass. App. to Pet. for Cert. 51a–57a. The District Court affirmed, similarly determining that unpaid workers' compensation premiums do not share the priority provided for unpaid contributions to employee pension and health

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[2]In its initial proof of claim, Zurich did not check the box marked "Contributions to an employee benefit plan," but instead checked a box marked "Other," and wrote in "Administrative Expense—Insurance Premiums." App. 22a, 30a. Zurich does not argue here that the workers' compensation premiums owed by Howard qualify as administrative expenses entitled to priority under §507(a)(2).

plans. *Id.*, at 39a–50a.

The Court of Appeals for the Fourth Circuit reversed 2 to 1 in a *per curiam* opinion. 403 F. 3d 228 (2005). The judges in the majority, however, disagreed on the rationale. Judge King concluded that §507(a)(5) unambiguously accorded priority status to claims for unpaid workers' compensation premiums. *Id.*, at 237. Judge Shedd, concurring in the judgment, found the §507(a)(5) phrase "employee benefit plan" ambiguous. Looking to legislative history, he concluded that Congress likely intended to give past due workers' compensation premiums priority status. *Id.*, at 238–239. In dissent, Judge Niemeyer, like Judge King, relied on the "plain meaning" of §507(a)(5), but read the provision unequivocally to deny priority status to an insurer's claim for unpaid workers' compensation premiums. *Id.*, at 241–244.

We granted certiorari, 546 U. S. ___ (2005), to resolve a split among the Circuits concerning the priority status of premiums owed by a bankrupt employer to a workers' compensation carrier. Compare *In re Birmingham-Nashville Express, Inc.*, 224 F. 3d 511, 517 (CA6 2000) (denying priority status to unpaid workers' compensation premiums), *In re Southern Star Foods, Inc.*, 144 F. 3d 712, 717 (CA10 1998) (same), and *In re HLM Corp.*, 62 F. 3d 224, 226–227 (CA8 1995) (same), with *Employers Ins. of Wausau* v. *Plaid Pantries, Inc.*, 10 F. 3d 605, 607 (CA9 1993) (according priority status), and 403 F. 3d, at 229 (case below) (same).[3]

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[3]We have jurisdiction of this case, as did the Court of Appeals, because the District Court's ruling qualifies as a final decision under 28 U. S. C. §158(d). See 403 F. 3d, at 231, and n. 6 (District Court's ruling effectively concluded the dispute between Zurich and Howard, for the adverse decision rendered Zurich's claim valueless and Zurich agreed to withdraw the claim if it failed to prevail on appeal). See also *In re Saco Local Development Corp.*, 711 F. 2d 441, 444 (CA1 1983) (majority opinion of Breyer, J.) ("Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes within the larger case*—and in particular, it has long

II

Adjoining subsections of the Bankruptcy Code, §507(a)(4) and (5), are centrally involved in this case. Subsections 507(a)(4) and (5) currently provide:

> "(a) The following expenses and claims have priority in the following order:
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> . . . . . .
>
> "(4) Fourth, allowed unsecured claims . . . for—
>
> "(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual . . . .
>
> . . . . . .
>
> "(5) Fifth, allowed unsecured claims for contributions to an employee benefit plan—
>
> "(A) arising from services rendered within 180 days before the date of the filing of the [bankruptcy] petition or the date of the cessation of the debtor's business, whichever occurs first . . . ." 11 U. S. C. A. §507 (Supp. 2006).

Two decisions of this Court, *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29 (1959), and *Joint Industry Bd. of Elec. Industry* v. *United States*, 391 U. S. 224 (1968), prompted the enactment of §507(a)(5). *Embassy Restaurant* concerned a provision of the 1898 Bankruptcy Act that granted priority status to "wages" but said nothing of "employee benefits plans" or anything similar. 11 U. S. C. §104(a)(2) (1952 ed., Supp. V; repealed 1978). We held that a debtor's unpaid contributions to a union welfare plan—which provided life insurance, weekly sick benefits, hospital and surgical benefits, and other advantages—did not qualify within the priority for unpaid "wages." 359 U. S., at 29–35. In *Joint Industry Bd.*, we

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provided that orders finally settling creditors' claims are separately appealable.").

followed *Embassy Restaurant* and held that an employer's bargained-for contributions to an employees' annuity plan did not qualify as "wages" entitled to priority status. 391 U. S., at 228–229.

To provide a priority for fringe benefits of the kind at issue in *Embassy Restaurant* and *Joint Industry Bd.*, Congress added what is now §507(a)(5) when it amended the Bankruptcy Act in 1978. See H. R. Rep. No. 95–595, p. 187 (1977) (hereinafter H. R. Rep.) (explaining that the amendment covers "health insurance programs, life insurance plans, pension funds, and all other forms of employee compensation that [are] not in the form of wages"); S. Rep. No. 95–989, p. 69 (1978). Notably, Congress did not enlarge the "wages, salaries, [and] commissions" priority, §507(a)(4), to include fringe benefits. Instead, Congress created a new priority for such benefits, one step lower than the wage priority. The new provision, currently contained in §507(a)(5), allows the provider of an employee benefit plan to recover unpaid premiums—albeit only after the employees' claims for "wages, salaries, or commissions" have been paid. §507(a)(4).

Beyond genuine debate, the main office of §507(a)(5) is to capture portions of employee compensation for services rendered not covered by §507(a)(4). Cf. *Embassy Restaurant*, 359 U. S., at 35; *Joint Industry Bd.*, 391 U. S., at 228–229 (both emphasizing Congress' prerogative in this regard). The current Code's juxtaposition of the wages and employee benefit plan priorities manifests Congress' comprehension that fringe benefits generally complement, or "substitute" for, hourly pay. See H. R. Rep., at 357 (noting "the realities of labor contract negotiations, under which wage demands are often reduced if adequate fringe benefits are substituted"); *id.*, at 187 ("[T]o ignore the reality of collective bargaining that often trades wage dollars for fringe benefits does a severe disservice to those working for a failing enterprise."); *In re Saco Local Development Corp.*,

711 F. 2d 441, 449 (CA1 1983) (majority opinion of Breyer, J.) (substitution of fringe benefits for wages "can normally be assumed, unless the employer is a philanthropist").

Congress tightened the linkage of (a)(4) and (a)(5) by imposing a combined cap on the two priorities, currently set at $10,000 per employee. See §507(a)(5)(B).[4] Because (a)(4) has a higher priority status, all claims for wages are paid first, up to the $10,000 limit; claims under (a)(5) for contributions to employee benefit plans can be recovered next up to the remainder of the $10,000 ceiling. No other subsections of §507 are joined together by a common cap in this way.

Putting aside the clues provided by *Embassy Restaurant*, *Joint Industry Bd.*, and the textual ties binding §507(a)(4) and (5), we recognize that Congress left undefined the §507(a)(5) terms: "*contributions* to an *employee benefit plan* . . . arising from *services rendered* within 180 days before the date of the filing of the [bankruptcy] petition." (Emphases added.) Maintaining that subsection (a)(5) covers more than wage substitutes of the kind at issue in *Embassy Restaurant* and *Joint Industry Bd.*, Zurich urges the Court to borrow the encompassing definition of employee benefit plan contained in the Employee

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[4]Section 507(a)(5)(B) provides:

"(a) The following expenses and claims have priority in the following order:

. . . . .

"(5) Fifth, allowed unsecured claims for contributions to an employee benefit plan—

. . . . .

"(B) for each such plan, to the extent of—

"(i) the number of employees covered by each such plan multiplied by $10,000; less

"(ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan." 11 U. S. C. A. §507 (Supp. 2006).

Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U. S. C. §1001 *et seq.* (2000 ed. and Supp. III). See §1002(1) (term "employee welfare benefit plan" means, *inter alia*, "any plan, fund, or program [that provides] its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . benefits in the event of sickness, accident, disability, death or unemployment"); §1002(3) (term "employee benefit plan . . . means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan"); cf. §1003(b)(3) (excluding plans "maintained solely for the purpose of complying with applicable work[ers'] compensation laws or unemployment compensation or disability insurance laws"). The dissent endorses this borrowing. See *post*, at 8–9.

Federal courts have questioned whether ERISA is appropriately used to fill in blanks in a Bankruptcy Code provision, and the panel below parted ways on this issue. See 403 F. 3d, at 235, n. 9 (King, J., concurring in judgment) ("declin[ing] to rely upon the ERISA definition"); *id.*, at 239–241 (Shedd, J., concurring in judgment) (reading legislative history to indicate that Congress intended "'employee benefit plan' in the bankruptcy priority provision to have the same meaning that [the term] has in ERISA"); *id.*, at 245 (Niemeyer, J., dissenting) (maintaining that ERISA definition is inapt in Bankruptcy Code priority context); cf. *Birmingham-Nashville Express*, 224 F. 3d, at 516–517 (noting division of opinion but concluding that decisions rejecting incorporation of ERISA's "employee benefit plan" definition into §507(a)(5) "ha[ve] the better of the argument"); *HLM Corp.*, 62 F. 3d, at 226 ("[T]he ERISA definition and associated court guidelines were designed to effectuate the purpose of ERISA, not the Bankruptcy Code." (internal quotation marks omitted)); *Southern Star Foods*, 144 F. 3d, at 714 (same). Compare Brief for American

Home Assurance Company et al. as *Amici Curiae* 17–25 (legislative history suggests Congress intended to incorporate ERISA definition), with Brief for National Coordinating Committee for Multiemployer Plans as *Amicus Curiae* 22–27, and n. 21 (legislative history suggests Congress did not intend to incorporate ERISA definition).

ERISA's omnibus definition does show, at least, that the term "employee welfare benefit plan" is susceptible of a construction that would include workers' compensation plans. That Act's signals are mixed, however, for 29 U. S. C. §1003(b)(3) specifically exempts from ERISA's coverage the genre of plan here at issue, *i.e.*, one "maintained solely for the purpose of complying with applicable work[ers'] compensation laws."[5] The §1003(b)(3) exemption strengthens our resistance to Zurich's argument. We follow the lead of an earlier decision, *United States* v. *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U. S. 213, 219 (1996), in noting that "[h]ere and there in the Bankruptcy Code Congress has included specific directions that establish the significance for bankruptcy law of a term used elsewhere in the federal statutes." *Id.*, at 219–220. No such directions are contained in §507(a)(5), and we have no warrant to write them into the text.

This case turns, we hold, not on a definition borrowed from a statute designed without bankruptcy in mind, but on the essential character of workers' compensation regimes. Unlike pension provisions or group life, health, and disability insurance plans—negotiated or granted as pay supplements or substitutes—workers' compensation

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[5]Congress also excluded most workers' compensation benefits from the purview of the Davis-Bacon Act, 40 U. S. C. §3141(2) (2000 ed., Supp. III), a measure that fixes a floor under wages on Government projects. The Davis-Bacon Act incorporates "bona fide fringe benefits," broadly defined, into prevailing wage determinations, but specifically excludes benefits contractors are required to provide under federal, state, or local law. §3141(2)(B).

prescriptions have a dominant employer-oriented thrust: They modify, or substitute for, the common-law tort liability to which employers were exposed for work-related accidents. See 6 A. Larson & L. Larson, Workers' Compensation Law §100.01[1], pp. 100–2 to 100–3 (2005) (hereinafter Larson & Larson); 4 J. Lee & B. Lindahl, Modern Tort Law: Liability and Litigation §43:25, pp. 43–45 to 43–46 (2d ed. 2003). As typically explained:

> "The invention of workers compensation as it has existed in this country since about 1910 involves a classic social trade-off or, to use a Latin term, a *quid pro quo*. . . . What is given to the injured employee is the right to receive certain limited benefits regardless of fault, that is, even in cases in which the employee is partially or entirely at fault, or when there is no fault on anyone's part. What is taken away is the employee's right to recover full tort damages, including damages for pain and suffering, in cases in which there is fault on the employer's part." P. Lencsis, Workers Compensation: A Reference and Guide 9 (1998) (hereinafter Lencsis).

Workers' compensation regimes thus provide something for employees—they assure limited fixed payments for on-the-job injuries—and something for employers—they remove the risk of large judgments and heavy costs generated by tort litigation. See 6 Larson & Larson §100.03[1], at 100–11 ("[Workers' compensation] relieves the employer not only of common-law tort liability, but also of statutory liability under virtually all state statutes, as well as of liability in contract and in admiralty, for an injury covered by the compensation act." (footnote omitted)); Lubove, Workmen's Compensation and the Prerogatives of Voluntarism, 8 Lab. Hist. 254, 258–262 (Fall 1967) (workers' compensation programs were adopted by nearly every State in large part because employers anticipated signifi-

cant benefits from the programs; other programs workers' groups sought to make mandatory—notably, health insurance—were not similarly embraced). No such tradeoff is involved in fringe benefit plans that augment each covered worker's hourly pay.[6]

Employer-sponsored pension plans, and group health or life insurance plans, characteristically insure the employee (or his survivor) only. In contrast, workers' compensation insurance, in common with other liability insurance in this regard, *e.g.*, fire, theft, and motor vehicle insurance, shield the insured enterprise: Workers' compensation policies both protect the employer-policyholder from liability in tort, and cover its obligation to pay workers' compensation benefits. See *In re HLM Corp.*, 165 B. R. 38, 41 (Bkrtcy. Ct. Minn. 1994). When an employer fails to secure workers' compensation coverage, or loses coverage for nonpayment of premiums, an affected employee's remedy would not lie in a suit for premiums that should have been paid to a compensation carrier. Instead, employees who sustain work-related injuries would commonly have recourse to a state-maintained fund. See, *e.g.*, Minn. Stat. §176.183, subd. 1 (2004); N. Y. Work. Comp. Law Ann. §26–a (West Supp. 2006). Or, in lieu of the limited benefits obtainable from a state fund under workers' compensation schedules, the injured employee might

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[6]Providing health care to workers fosters a healthy and happy workforce, and a contented workforce benefits employers. The dissent suggests this as a reason to rank workers' compensation insurance with health and pension plans for bankruptcy priority purposes. See *post*, at 5. But the benefit employers gain from providing health and pension plans for their employees is of a secondary order; indeed, under the dissent's logic, wages could be said to "benefit" the employer because they ensure that employees come to work, can afford transportation to the job site, etc. These benefits redound to the employer reflexively, as a consequence of the benefit to the employee. Workers' compensation insurance, by contrast, directly benefits insured employers by eliminating their tort liability for workplace accidents.

be authorized to pursue the larger recoveries successful tort litigation ordinarily yields. See, *e.g.*, *id.*, §11 (West 2005); W. Va. Code §23–2–8 (Lexis 2005); Lencsis 67.

Further distancing workers' compensation arrangements from bargained-for or voluntarily accorded fringe benefits, nearly all States, with limited exceptions, require employers to participate in their workers' compensation systems. See, *e.g.*, Ill. Comp. Stat., ch. 820, §305/4 (West 2004); Minn. Stat. §176.181, subd. 2 (2004); U. S. Dept. of Labor, Office of Workers' Compensation, State Workers' Compensation Laws, Table 1: Type of Law and Insurance Requirements for Private Employment (2005), available at http://www.dol.gov/esa/regs/statutes/owcp/stwclaw/tables-pdf/table1.pdf (as visited June 13, 2006, and available in Clerk of Court's case file). An employer who fails to secure the mandatory coverage is subject to substantial penalties, even criminal liability. We do not suggest, as the dissent hypothesizes, see *post*, at 6–7, that a compensation carrier would gain §507(a)(5) priority for unpaid premiums in States where workers' compensation coverage is elective. Nor do we suggest that wage surrogates or supplements, *e.g.*, pension and health benefits plans, would lose protection under §507(a)(5) if a State were to mandate them. We simply count it a factor relevant to our assessment that States overwhelmingly prescribe and regulate insurance coverage for on-the-job accidents, while commonly leaving pension, health, and life insurance plans to private ordering.[7]

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[7] *Saco Local Development Corp.*, 711 F. 2d, at 448–449, we note, is not at odds with our conclusion that unpaid workers' compensation premiums do not qualify for priority status. The First Circuit held in *Saco* that a group life, health, and disability insurance plan fit within §507(a)(5), though the benefit package was unilaterally provided by the employer, and not installed pursuant to collective bargaining. Wage surrogates, then-Judge Breyer explained, need not be negotiated to qualify under §507(a)(5) as "employee benefit plans," for "Congress' object in enacting [that subsection] was to extend the 1898 Act's wage priority to new forms of compensation, such as insurance and other

We note that when the Fourth Circuit confronted a claim for workers' compensation premiums owed not to a private insurer but to a state fund, that court ranked the premiums as "excise taxes" qualifying for bankruptcy priority under what is now §507(a)(8)(E). See *New Neighborhoods, Inc.* v. *West Virginia Workers' Comp. Fund*, 886 F. 2d 714, 718–720 (1989).[8] See also *In re Suburban Motor Freight, Inc.*, 998 F. 2d 338, 342 (CA6 1993) ("Where a State 'compel[s] the payment' of 'involuntary exactions, regardless of name,' and where such payment is universally applicable to similarly situated persons or firms, these payments are taxes for bankruptcy purposes." (quoting *New Neighborhoods*, 886 F. 2d, at 718–719 (alteration and citations omitted in original))); LeRoy et al., Workers' Compensation in Bankruptcy: How Do the Parties Fare? 24 Tort & Ins. L. J. 593, 623–624 (1989) (describing disagreement among courts on whether payments to state-run workers' compensation funds qualify as excise taxes under §507(a)(8)). We express no view on the §507(a)(8)(E) issue presented in *New Neighborhoods*. We venture only this observation: It is common for Congress to prefer Government creditors over private creditors, see *Birmingham-Nashville Express*, 224 F. 3d, at 517–518; it would be anomalous, however, to advance Zurich's claim to level (a)(5) while leaving state-fund creditors at level (a)(8).

Zurich argues that according its claim an (a)(5) priority will give workers' compensation carriers an incentive to

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fringe benefits." *Id.*, at 449. *Saco* did not involve workers' compensation regimes, and the First Circuit expressed no opinion on them.

[8]The state fund in *New Neighborhoods*, it appears, did not urge that claims for unpaid workers' compensation premiums qualify for the higher (a)(5) priority. The Fourth Circuit's opinion in that case, however, suggests that the court assumed a private compensation carrier would be accorded no priority. See 886 F. 2d, at 720 (under court's holding, "a state agency is given, as an insurer, priority in bankruptcy when a private insurer is not").

continue coverage of a failing enterprise, thus promoting rehabilitation of the business. It may be doubted whether the projected incentive would outweigh competing financial pressure to pull the plug swiftly on an insolvent policyholder, and thereby contain potential losses. An insurer undertakes to pay the scheduled benefits to workers injured on the job while the policy is in effect. In the case of serious injuries, however, benefits may remain payable years after termination of coverage. See 1 Larson & Larson §§10.02–10.03, at 10–3 to 10–7; Lencsis 51–52. While cancellation relieves the insurer from responsibility for future injuries, the insurer cannot escape the obligation to continue paying benefits for enduring maladies or disabilities, even though no premiums are paid by the former policyholder. An insurer would likely weigh in the balance the risk of incurring fresh obligations of long duration were it to continue insuring employers unable to pay currently for coverage. That consideration might well be controlling even with an assurance of priority status, for there is no guarantee that creditors accorded preferred positions will in fact be paid. See Tr. of Oral Arg. 31–32 ("[A]s soon as they smell bankruptcy, they're going to pull the plug anyway." (SCALIA, J.)); LeRoy, *supra*, at 596 (noting "general reluctance on the part of private insurers to provide debtors with the necessary Workers' Compensation coverage").

Rather than speculating on how workers' compensation insurers might react were they to be granted an (a)(5) priority, we are guided in reaching our decision by the equal distribution objective underlying the Bankruptcy Code, and the corollary principle that provisions allowing preferences must be tightly construed. See *Kothe*, 280 U. S., at 227 ("The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate . . . ."); *Nathanson*, 344 U. S., at 29 ("The theme of the Bankruptcy Act is 'equality of distribution', . . . and if one claimant is to be preferred over others, the purpose

should be clear from the statute." (quoting *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U. S. 215, 219 (1941))); H. R. Rep., at 186; 2 Collier Bankruptcy Manual ¶507.01, p. 507–4 (rev. 3d ed. 2005) ("[P]riorities under the Code are to be narrowly construed.").

Every claim granted priority status reduces the funds available to general unsecured creditors and may diminish the recovery of other claimants qualifying for equal or lesser priorities. See *Joint Industry Bd.*, 391 U. S., at 228–229. "To give priority to a claimant not clearly entitled thereto is not only inconsistent with the policy of equality of distribution; it dilutes the value of the priority for those creditors Congress intended to prefer." *In re Mammoth Mart, Inc.*, 536 F. 2d 950, 953 (CA1 1976). Cases like Zurich's are illustrative. The Bankruptcy Code caps the amount recoverable for contributions to employee benefit plans. See *supra*, at 6–7. Opening the (a)(5) priority to workers' compensation carriers could shrink the amount available to cover unpaid contributions to plans paradigmatically qualifying as wage surrogates, prime among them, pension and health benefit plans.[9]

In sum, we find it far from clear that an employer's liability to provide workers' compensation coverage fits the §507(a)(5) category "contributions to an employee benefit plan . . . arising from services rendered." Weighing against such categorization, workers' compensation does not compensate employees for work performed, but instead, for on-the-job injuries incurred; workers' compensation regimes substitute not for wage payments, but for tort liability. Any doubt concerning the appropriate characterization, we conclude, is best resolved in accord with the Bankruptcy Code's equal distribution aim. We therefore reject the

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[9]The dissenting opinion nowhere homes in on the reality that including amounts owed to workers' compensation carriers risks diminishing funds available to cover contributions to workers' pension and health care plans.

expanded interpretation Zurich invites. Unless and until Congress otherwise directs, we hold that carriers' claims for unpaid workers' compensation premiums remain outside the priority allowed by §507(a)(5).

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the Fourth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 05–128

HOWARD DELIVERY SERVICE, INC., ET AL., PETITIONERS *v.* ZURICH AMERICAN INSURANCE CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 15, 2006]

JUSTICE KENNEDY, with whom JUSTICE SOUTER and JUSTICE ALITO join, dissenting.

The Court of Appeals for the Fourth Circuit held that payments for workers' compensation coverage are "contributions to an employee benefit plan . . . arising from services rendered." 11 U. S. C. A. §507(a)(5) (Supp. 2006). In reversing that judgment the Court's opinion relies on the premise that "statutorily prescribed workers' compensation regimes do not run exclusively to the employees' benefit." *Ante,* at 2. This rationale, however, does not suffice to justify the Court's holding. It does not accord, moreover, with the text or purpose of the bankruptcy priority defined in §507(a)(5). These are the main points of this respectful dissenting opinion.

I

Before commencing a more detailed discussion of the central issue, certain preliminary matters must be addressed. To begin with, the Court states a background rule of construction that, when we interpret the Bankruptcy Code, "provisions allowing preferences must be tightly construed." *Ante,* at 14. The Court links this rule with a general objective in the Code for equal distribution. *Ibid.* That objective, it is true, is acknowledged by our

precedents, and we have said that a Code provision must indicate a clear purpose to prefer one claim over another before a priority will be found. See *Nathanson* v. *NLRB*, 344 U. S. 25, 29 (1952). This is different, though, from establishing an interpretive principle of strict construction when the Code addresses priorities, for strict construction can be in tension with the objective of "equality of distribution for similar creditors." *Small Business Administration* v. *McClellan*, 364 U. S. 446, 452 (1960). The bankruptcy priorities, then, should not be read simply to give priorities to as few creditors as possible. They should be interpreted in accord with the principle of equal treatment of like claims. In any event the priority provisions should not be read so narrowly as to conflict with their plain meaning.

In accord with these principles the Court does not seem to dispute that the payments at issue here are "contributions" that "aris[e] from services rendered," §507(a)(5). There seems little doubt that both these statutory requirements are met. Petitioner Howard Delivery Service, Inc. (Howard), argues that a contribution must be voluntary; and it says that because the workers' compensation payments in this case are mandatory, they cannot be contributions. In some situations—for example, in discussing charitable contributions—it is possible to read "contributions" as Howard suggests. See Webster's Third New International Dictionary 496 (1971) (defining "contribution" as "a sum or thing voluntarily contributed"). In the context of employer payments, however, the voluntariness requirement does not accord with the usual meaning of the word. See *ibid.* (defining "contribution" alternatively as "a sum paid by an employer to an unemployment or group-insurance fund"). Many federal statutes and this Court's own cases expressly refer to "mandatory contributions" when discussing payments by employers and employees. See, *e.g.*, 26 U. S. C. §411(a)(3)(D); 29 U. S. C. §1053(a)(3)(D); §1054(c)(2)(C);

§1344; *Hughes Aircraft Co.* v. *Jacobson*, 525 U. S. 432, 435 (1999); *General Building Contractors Assn., Inc.* v. *Pennsylvania*, 458 U. S. 375, 394 (1982); *United States* v. *Lee*, 455 U. S. 252, 258 (1982). Even for pension and health benefit plans, which undeniably fall within the §507(a)(5) priority, the payments are rarely if ever voluntary in the charitable sense that Howard invokes. The mandatory nature of most workers' compensation coverage, then, fails to establish that the payments are not contributions.

Howard's argument that the workers' compensation payments here do not "aris[e] from services rendered," §507(a)(5), is also unpersuasive. This phrase, according to Howard, does not cover payments to insurance companies because those payments are made in exchange for the services of the insurance company, not the services of the employees. The Court seems to accept that insurance payments can receive the priority, see *ante*, at 5–6, 9, and this is part of the statute's necessary operation. Even if the payments may go to the insurance company, they are predicated nonetheless on the employees' performing services for the employer. They therefore "aris[e] from services rendered" in the same manner as do payments to a pension, health, or disability plan. From a practical standpoint, moreover, "[t]o allow the insurer to obtain its premiums through the priority would seem the surest way to provide the employees with the policy benefits to which they are entitled." *In re Saco Local Development Corp.*, 711 F. 2d 441, 449 (CA1 1983) (majority opinion by Breyer, J.).

II

The question that remains—and my main point of disagreement with the Court—is whether workers' compensation insurance qualifies as an "employee benefit plan." The answer, one would think, depends on whether workers' compensation plans provide benefits to employees. It

is clear that they do, as the employer's contributions enable the insurer to give out substantial payments to employees.

Even assuming that the benefit the employer provides must be a net benefit, this condition is easily satisfied. It is true that, in return for receiving workers' compensation, employees give up some of the common-law tort remedies they otherwise could have pursued. See *ante,* at 9–11. The common-law remedies, though, typically required the employer to be at fault; and they were further limited by the defenses of contributory negligence, assumption of risk, and the fellow-servant doctrine. See 1 A. Larson & L. Larson, Workers' Compensation Law §2.03 (2005). As a result, only a small percentage of injured workers received any recovery. *Ibid.* Workers' compensation plans, even considering the tort claims relinquished, thus are generally a benefit to employees. See *id.,* §2.03, at 2–6 (noting the "helplessness which characterized the position of the injured worker of the precompensation era"). Even where an employee might have received greater damages in a tort suit, the greater speed and certainty of payment in workers' compensation is often worth the trade-off. In many States, moreover, the employee has a choice to opt out of the workers' compensation system, leaving him or her with traditional tort remedies. See, *e.g.,* Ariz. Rev. Stat. Ann. §23–906 (West 1995); Cal. Lab. Code Ann. §4154 (West 2003); Ky. Rev. Stat. Ann. §342.395 (West 2005); Mass. Gen. Laws, ch. 152, §24 (West 2005); N. D. Cent. Code Ann. §65–07.1–03 (Lexis 2003); Pa. Stat. Ann. Tit. 77, §1402(b) (Purdon 2002); R. I. Gen. Laws §28–29–17 (Supp. 2005). When the employee chooses workers' compensation, it plainly should be considered a benefit. For these reasons, workers' compensation plans, on the whole, are a benefit to employees; and indeed, the Court does not suggest otherwise.

Instead, the Court holds that workers' compensation is

not an "employee benefit plan" largely because it also benefits employers. *Ante*, at 10–11. The text of the statute does not refer to whether the plan benefits employers, nor would it make sense to do so. Since the goal of the priority is to protect the benefits of employees, there is little reason to suppose that employees should lose that protection based on the additional fact that employers may gain something as well. Employers rarely make large payments to employee funds out of altruism, and surely the Court should not hold that employee benefits provide no benefit to the employer. In the case of health benefits, for example, the employer may receive tax breaks, good will, a healthy work force, and the leverage to pay lower wages. Workers' compensation cannot be distinguished on this basis from pension, health, or disability plans, all of which the Court recognizes as covered by the priority.

The Court's three other bases for treating workers' compensation differently also find no support in the Bankruptcy Code. First, the Court maintains, based on the purpose and structure of the "employee benefit plan" priority in relation to the wage priority of §507(a)(4), that only wage substitutes are covered. *Ante*, at 5–7. Even assuming this proposition were correct, it would not lead to the Court's conclusion. That is because workers' compensation plans, as a matter of economic realities, are wage substitutes. The Court made this precise point in one of the first cases addressing a workers' compensation scheme: "[J]ust as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale." *New York Central R. Co.* v. *White*, 243 U. S. 188, 201–202 (1917). Recent empirical studies confirm that employers pass on the cost of workers' compensation to employees in the form of lower wages. See

Fishback & Kantor, Did Workers Pay for the Passage of Workers' Compensation Laws? 110 Quarterly Journal of Econ. 713 (1995); Gruber & Krueger, The Incidence of Mandated Employer-Provided Insurance: Lessons from Workers' Compensation Insurance, 5 Tax Policy and the Economy 111 (D. Bradford ed. 1991); Viscusi & Moore, Workers' Compensation: Wage Effects, Benefit Inadequacies, and the Value of Health Losses, 69 Review of Econ. and Stats. 249 (1987).

Second, the mandatory nature of most workers' compensation plans does not change the applicability of the priority. The benefit to employees is real and significant regardless of whether the government has mandated the benefit. While States generally "prescribe and regulate" workers' compensation and leave other benefits "to private ordering," *ante,* at 12, the presence of bargaining has no bearing on whether contributions should receive priority. See *Saco,* 711 F. 2d, at 448–449. Indeed, it is difficult to imagine that if States began to mandate other kinds of benefits, those benefits would promptly fall outside §507(a)(5). This would amount to saying that whenever some form of protection for employees comes to be accepted as so necessary for their welfare that it is mandated as an employer responsibility it is no longer a benefit.

While the Court says the general practice among the States of making workers' compensation mandatory is just one factor in the analysis, *ante,* at 12, presumably the Court does not suggest that an optional workers' compensation scheme is an "employee benefit plan" simply because other States have mandatory schemes. Assuming, then, that a given optional workers' compensation scheme might receive the priority, the Court's approach will create uncertainty about application of the priority to the relevant payments. Only a few States have wholly permissive regimes, see, *e.g.,* Tex. Lab. Code Ann. §406.002 (West

2006), but many more offer exemptions for particular kinds of employers, see, *e.g.*, Tenn. Code Ann. §50–6–106(5) (2005); Mich. Comp. Laws §418.118(2) (1981). Not only will application of the priority depend on varying state laws, but also multistate workers' compensation plans may have to be segmented for purposes of determining bankruptcy priorities. There is nothing in §507(a)(5) to suggest an intent to cause this kind of disuniformity.

Third, the existence of state funds to compensate employees when their employers fail to provide workers' compensation benefits has little relevance. Once again, it is unclear how much weight the Court places on this factor, and it seems doubtful that the Court would remove health plans from the priority simply because a State created a fallback public health system. In any event state fallback funds do not change the fact that the employer is providing a benefit; a fallback fund simply indicates the employee could have received the benefit from somewhere else. Were it otherwise, pension plans would also fall outside the priority, since it appears they must provide benefits even if the employer has defaulted on its contributions. See *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U. S. 559, 567, n. 7 (1985) (citing Department of Labor advisory opinion). As a practical matter, moreover, most large multiemployer plans effectively guarantee compensation (unless all the employers happen to go bankrupt at the same time), and the Pension Benefit Guaranty Corporation ensures payment of at least some of the promised benefits. The exclusion of these plans from the priority, however, would accord with neither the text of the provision nor the common sense notion that protecting the insurer—whether it be a private company, a multiemployer plan, or a government fund—is the best way to protect the employees. See *Saco, supra*, at 449. Simply put, harm to the insurer will be passed along to the em-

ployees, either by rendering the insurer unable to pay or causing it to charge higher rates for the same coverage.

Finally, even if the language of §507(a)(5) were ambiguous, the definition of "employee benefit plan" in the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U. S. C. §1001 *et seq.* (2000 ed. and Supp. III), would lend considerable support to respondent's view. ERISA defines "employee benefit plan" as including an "employee welfare benefit plan," §1002(3), which in turn "mean[s] any plan, fund, or program which . . . was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . benefits in the event of sickness, accident, disability, death or unemployment," §1002(1). The definition of a term in one statute does not necessarily control the interpretation of that term in another statute, for where the purposes or contexts are different the terms may take on different meanings. See *United States* v. *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U. S. 213, 219–224 (1996). Where no conflicting purpose or context is apparent, though, other statutes may provide at least some evidence of Congress' understanding. See *Securities Industry Assn.* v. *Board of Governors, FRS*, 468 U. S. 137, 150–151 (1984); see also *ante*, at 9.

The ERISA definition is of particular relevance here given that "employee benefit plan" is not a generic phrase but something closer to a term of art, with a meaning that seems unlikely to change based on statutory context. Also, neither Howard nor the Court cites any source for a definition of "employee benefit plan" that would exclude workers' compensation. The Court attempts to minimize the significance of the ERISA definition by noting that ERISA exempts from its coverage any plan "maintained solely for the purpose of complying with applicable workmen's compensation laws." §1003(b)(3); see *ante*, at 9. Congress

exempted these plans from coverage, but it did not exclude them from its definition, and this is the relevant consideration. Indeed, the language of the exclusion confirms that workers' compensation is an employee benefit plan. See §1003(b) ("The provisions of this subchapter shall not apply to any employee benefit plan if . . . such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws"). The exemption also belies the Court's position because it shows that mandatory workers' compensation plans were not included in the definition for any purpose particular to ERISA. Instead, since they were exempted from coverage, the most plausible reason for their inclusion (only to be then excluded) is that Congress was simply giving the ordinary definition of the term. There is no indication in §507(a)(5) that Congress chose to depart from that ordinary definition. By contrast, when Congress wanted a particular provision of the Bankruptcy Code to narrow the ordinary definition to exclude mandatory workers' compensation, it did so expressly by referring to those plans covered by ERISA. See 11 U. S. C. A. §541(b)(7) (Supp. 2006).

An "employee benefit plan," whether viewed as a term of art or in accordance with its plain meaning, includes workers' compensation. These are the reasons for my respectful dissent.